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Supreme Court, U.S.
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In the

Supreme Court of the United States

IN THE INTEREST OF:
K.M.H., A Child Under the Age Eighteen
And
K.C.H., A Child Under the Age Eighteen
IN THE MATTER OF THE PATERNITY OF:
K.C.H. and K.M.H. by and through the next friend,
DARYL D. HENDRIX,

Petitioner,

and

SAMANTHA HARRINGTON,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of State of Kansas

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondent, an unmarried woman, gave birth to twin daughters on May 18, 2005. The day after their birth, she filed a CINC [Child In Need of Care] petition, seeking to terminate Petitioner's parental rights. The petition identified Petitioner as "[t]he minor children's father" and alleged that the twins were in need of care "as it relates to the father" and that "the [f]ather should be found unfit and his rights terminated." The petition continued to refer to Petitioner throughout as the twins' father. On May 31, 2005, Petitioner filed an answer to the CINC petition and filed a separate paternity action acknowledging his financial responsibility for the children and claiming parental rights, including joint custody and visitation. The CINC and paternity actions were consolidated. The children had been conceived by means of artificial insemination, but the parents had known each other and were friends. Petitioner maintained that the parties had an oral agreement to co-parent the children. Respondent filed a motion to dismiss the paternity action, invoking K.S.A. 38-1114(f), which provides that a donor of semen to a licensed physician for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the birth father of a child thereby conceived, unless agreed to in writing by the donor and the woman. The district court dismissed Petitioner's paternity action, without a hearing on the merits as to the Petitioner's fitness to be a parent, and terminated the Petitioner's parental rights, and the Supreme Court of Kansas affirmed. The district court's and the Kansas Supreme Court's holdings are in direct conflict with the hold-

ings of this Court, including *Stanley v. Illinois* 405. U.S. 645 (1972), (which found unconstitutional a state's statute wherein the children of an unmarried father, upon the death of the mother, were declared dependents without any hearing on parental fitness and without proof of neglect) and *Lehr v. Robertson* 463 U.S. 248 (1983), which held that "A father's voluntary assumption of fiscal responsibility for his child should be endorsed as a socially responsible action. A statute which absolutely extinguishes a father's efforts to assert the rights and responsibility of being a father, in a case with such facts as those *sub judice,* runs contrary to due process safeguards." The statute itself is unconstitutional, as one of the dissenting justices in the instant case observed, it is a "generative statute of frauds," which divests children of half of their heritage, and potentially renders them wards of the state, on the basis of an implied waiver of the father's right to parent, violative of the father's due process rights. Moreover, this case, which deals with the impact of relatively new reproductive technology on traditional family norms and values was one of first impression in the state of Kansas, and adds to an emerging conflict in the statutes and holdings of various States as they grapple with the rights and responsibilities of parents and of their children who have been brought into the world by means of technologies and methods which may be the harbingers of the Brave New World foreseen by Aldous Huxley.

The questions presented are:

1. Whether K.S.A. 38-1114(f) is unconstitutional because it deprives biological fathers of their due process and equal protection safeguards in the absence of either a voluntary relinquishment or a judicial finding of unfitness.

2. Whether the Kansas Supreme Court erred in applying an intermediate level of scrutiny as if the equal protection claim was gender-based rather than applying strict scrutiny in a matter involving D.H.'s fundamental parental rights, and whether 38-1114(f) withstands strict scrutiny when the party asserting constitutionality must demonstrate a compelling state interest justifying the classification.

3. Whether the equal protection and procedural and substantive due process safeguards of the Fourteenth Amendment were denied to Petitioner when the district court and the Supreme Court of Kansas denied him standing to a hearing on the merits of the CINC and paternity petitions, on the basis of an implied waiver of fundamental rights, when such waiver has to be made knowingly, and accordingly the Petitioner's evidence of an oral agreement to co-parent,made by the parties prior to the birth of the children, was ignored.

4. Whether K.S.A. 38-1114(f) is unconstitutional because it denies children equal protection for rights to their paternity and the benefits of established paternity, and because the state abrogated its *parens patriae* responsibility and made decisions protecting its version of artificial insemination rather than the interests, needs, and rights of children and fathers.

5. Whether the district court and the Kansas Supreme Court erred in finding that the Petitioner's equal protection and due process rights to establish paternity and the children's rights to the companionship and financial support of their father were outweighed by and subordinate to the state's interest in protecting, by means of K.S.A. 38-1114(f) , women recipients against the potential claims of donors to parental rights and responsibilities, apparently expanding a woman's discretionary powers embodied in her to terminate a pregnancy to now include discretionary powers to divest her children who were born and are persons in being from a relationship of companionship and support from their father.

PARTIES TO THE PROCEEDING

The petitioner is Daryl D. Hendrix, a resident of the State of Kansas, referred to as D..H. in the proceedings below.

The respondent is Samantha Harrington, a resident of the State of Kansas, referred to as S.H. in the proceedings below.

K.M.H. and K.C.H. are children under the age of eighteen, both residents of the State of Kansas, and they were made parties to the proceedings below by virtue of a CINC [Child in Need of Care] petition filed by Samantha Harrington, and a paternity, support and joint custody petition filed by Daryl D. Hendrix, as their next friend. A guardian ad litem had been appointed for the children by the district court.

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PETITION FOR WRIT OF CERTIORARI

Daryl Hendrix respectfully petitions this Court for a writ of certiorari to review the judgment of the Supreme Court of the State of Kansas in this case.

OPINIONS BELOW

The judgment of the District Court of Shawnee County, Kansas, granted the mother's Motion to Dismiss on December 27, 2005. The Kansas Supreme Court interpreted the District Court's ruling as a Motion for Summary Judgment and affirmed the District Court on October 26, 2007, then denied the father's Motion for Rehearing on December 18, 2007. The Kansas Supreme Court's opinion of October 26, 2007, is reported at 285 Kan.53, and at 169 P.3d 1025 (2007).

JURISDICTION

The Order denying rehearing is dated December 18, 2007. Appellate invokes this Court's jurisdiction over *In re K.M.H.* because the final judgment of the highest court of Kansas has been rendered. 28 U.S.C. §1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment of the United States Constitution provides, in pertinent part:

Section 1. . . . No State shall make or enforce any law which shall abridge the privileges and immunities of

citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 666(a)(5)(L). The Public Health and Welfare.

Subchapter IV. Grants to States for Aid and Services to Needy Families with Children and for Child-Welfare Services.

§ 666. Requirement of statutorily prescribed procedures to improve effectiveness of child support enforcement.

(L) Standing of Putative Fathers.

Procedures ensuring that the putative father has a reasonable opportunity to initiate a paternity action.

K.S.A. Chapter 38: Minors. Article 11. Determination of Parentage.

38-1114. Presumption of paternity.

(a) A man is presumed to be the father of a child if:

. . .

(4) The man notoriously or in writing recognizes paternity of the child, including but not limited to a voluntary acknowledgment made in accordance with K.S.A. 38-1130 or 65-2409a, and amendments thereto.

(5) Genetic test results indicate a probability of 97% or greater that the man is the father of the child.

(6) The man has a duty to support the child under an order of support regardless of whether the man has ever been married to the child's mother.

(b) A presumption under this section may be rebutted only by clear and convincing evidence, by a court decree establishing paternity of the child by another man or as provided in subsection (c). If a presumption is rebutted, the party alleging the existence of a father and child relationship shall have the burden of going forward with the evidence.

(c) If two or more presumptions under this section arise which conflict with each other, the presumption which on the facts is founded on the weightier considerations of policy and logic, including the best interests of the child, shall control.

. . .

(f) The donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the birth father of a child thereby conceived, unless agreed to in writing by the donor and the woman. (App. 76).

K.S.A. 38-1115. Determination of father and child relationship; who may bring action; when action may be brought; revocation of acknowledgment.

(a) A child or any person on behalf of such a child, may bring an action:

(1) At any time to determine the existence of a father and child relationship presumed under K.S.A. 38-1114 and amendments thereto; or

(2) at any time until three years after the child reaches the age of majority to determine the existence of a father and child relationship which is not presumed under K.S.A. 38-1114 and amendments thereto.

STATEMENT OF THE CASE

This case presents a direct conflict between a state statute, which one of the dissenting opinions has aptly characterized as a "generative statute of frauds" and a father's fundamental right to parent, which was denied without due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution. (Hill J., dissenting, App, 64). The decisions of the Supreme Court of Kansas and the District Court of Shawnee County set a disturbing judicial precedent which will deprive the children of the parties, and of other children yet unborn, of their rights to paternal companionship, support and inheritance, without a best interests analysis. This case of first impression represents an attempt to harmonize the law with a growing phenomenon of mothers who

seek to bypass the rights of fathers through the use of artificial or assisted reproduction techniques. Many state statutes deal with artificial or assisted reproduction, a ruling by this Court in the instant case will help clarify the issues and protect the rights of fathers and children conceived by means of artificial insemination. (App. 76).

The majority's opinion below appears to view the two parties and their two children as a novel "test case," treating the children that were conceived by the parties as objects, governed by principles of contract law, rather than as human beings who deserve the protections afforded to them by operation of traditional family law principles, which view the best interests of children as the paramount objective. Respectfully, the opinion of the Kansas Supreme Court, by focusing on the apparent novelty of reproductive techniques, serves to undermine the strong physical and emotional bonds between mothers, fathers and children by which human families and the human race has been perpetuated, since time immemorial. In doing so, the Supreme Court of Kansas has divested the unnamed two children who should have been at the center, and not the periphery of the court's attention, of their birthright to something which is of inestimable value: the love, affection and companionship of a father who took extraordinary measures to see them come into this world, who exchanged promises with the mother to co-parent the children, who immediately accepted financial and moral responsibility for them, and who has made every possible effort available to him to be a part of his children's lives, and whose fundamental rights to in fact be allowed to

be a father, have been frustrated by a mechanistic application of a law which, without due process, cut off his parental rights *ab initio*.

Petitioner respectfully submits that at the center of this Court's attention should be a basic and fundamental truth: families have been the corner stone of human society wherever it has been found, and the relationship between children and their mothers and fathers is crucial to the development of healthy and happy individuals, and in turn of a just and welcoming community. Yet in modern times the family unit has come under steady assault. The disintegration of families and the new prevalence of children born out of wedlock and single parenthood has brought poverty and uncertainty to many children, and the marginalization of fathers is a phenomenon that perpetuates itself. The decision of the Kansas Supreme Court, left undisturbed, will help create a new under class of children, who will not be able to petition their legally non-existent fathers for support, and will in all likelihood leave these children with a permanent and unnecessary sense of loss and abandonment.

This Court should decide the important question of whether a father can be deemed to have waived his rights, and the rights of his children to a parent-child relationship by not entering into a written agreement with the mother, when there was evidence that the father and the mother had in fact agreed to co-parent, and the existence of the statute was not know to the father, who was not a lawyer, and may have been known by the mother, who was his friend, and was a lawyer. More fundamentally, this Court should decide

the important question of whether, by operation of this statute, a father and a mother, or the state, can bargain away children's rights to the monetary and emotional support of their father.

A. The Underlying Petitions and Judgment

Because of the procedural posture of this case wherein the father was denied standing at the outset of the case the Kansas Supreme Court was presented with a cold record, wherein many of the underlying facts were not disputed, as the father's lack of standing prevented him from introducing evidence, and for that evidence to pass through the crucible of cross examination and credibility determinations of trial or evidentiary hearing. The record, as it is, shows that the mother, S.H., is an unmarried female lawyer who wanted to become a parent through artificial insemination from a known donor. She was a friend of the donor, D.H., an unmarried male nonlawyer, who agreed to provide sperm for the insemination. Both S.H. and D.H. are Kansas residents, and their oral arrangements for the donation occurred in Kansas, but S.H. underwent two inseminations with D.H.'s sperm in Missouri.

D.H. accompanied S.H. to a Missouri clinic for the first procedure and provided the necessary sperm to medical personnel. The first procedure did not result in a pregnancy. D.H. did not accompany S.H. to Missouri for the second procedure. Instead, he provided the sperm to S.H., and she took the sperm across state lines and delivered it to the Missouri physician responsible for the insemination. The

second procedure resulted in S.H.'s pregnancy and the birth of the twins.

There was no formal written contract between S.H. and D.H. concerning the donation of sperm, the artificial insemination, or the expectations of the parties with regard to D.H.'s parental rights or lack thereof.

The twins were born on May 18, 2005. The day after their birth, S.H. filed a CINC petition concerning the twins, seeking a determination that D.H. would have no parental rights. The petition identified D.H. as "[t]he minor children's father" and alleged that the twins were in need of care "as it relates to the father" and that "the [f]ather should be found unfit and his rights terminated." The Respondent alleged in her CINC petition that there were several reasons for termination of D.H.'s parental rights, including his alleged failure to provide pre-natal and financial support. (App. 63). By pointing out these alleged failings in providing pre-natal emotional and financial support, S.H. implied that she intended D.H. to play a role in the parenting process. (App. 63). The petition continued to refer to D.H. throughout as the twins' father, and as Justice Caplinger notes in her dissenting opinion notes, the CINC petition made mention of D.H. as the children's father no less than 56 times. (App. 63). No reference or mention was made in the CINC petition of K.S.A. 38-1114(f). (App. 63, App. 76).

On May 31, 2005, D.H. filed an answer to the CINC petition and filed a separate paternity action acknowledging his financial responsibility for the children and claiming parental rights, including joint custody and

visitation. The CINC and paternity actions were consolidated. S.H. filed a motion to dismiss the paternity action, for the first time invoking K.S.A. 38-1114(f). This first mention of K.S.A. 38-1114(f) was made by Respondent more than two weeks after Petitioner's filing of an amended petition. (App. 63). After the motion was filed, the district judge raised questions concerning choice of law and the constitutionality of the statute and ordered the parties to brief these issues along with the other issues arising out of the motion to dismiss. (App. 68).

The District Court of Shawnee County in its findings of facts noted that the parties disagreed as to whether Petitioner was to have any parental role after the birth of the children. (App. 69). Petitioner challenged the constitutionality of K.S.A. 38-1114(f) in the proceedings before the district court. (App. 71). Petitioner first raised the issue of the constitutionality of the statute in his Memorandum in Response to the Motion to Dismiss, wherein he discusses the 14th amendment and due process rights in general. (Memorandum in Response to Motion to Dismiss, p 4). Citing to *In Re D.B.S.*, 20 Kan.App.2d 438 (KS Ct. App. 1995), Petitioner discussed the balancing of state's interests and putative father's interest. (Id.). In the Memorandum, Petitioner also discussed a Texas case, wherein, under analogous circumstances, a father was found to have standing to litigate the issue of paternity. (Memorandum in Response to Motion to Dismiss, p.4, 5, citing to *In re: Sullivan* 15 S.W. 3d 911 (Ct. App. Texas 2005). In a subsequent Memorandum Brief, Respondent further addressed the issue of the constitutionality of the Statute, and discussed an Ohio

case that found that a similar donor statute was unconstitutional because it was applied without discrimination to known and unknown donors and made no exception for an agreement, and because public policy supports the concept of legitimacy and the concomitant rights of a child to support and inheritance. (Memorandum Brief of Daryl D. Hendrix, p. 7, citing *C.O. v. W.S.*639 N. E. 2d 523 (Court of Common Pleas, Ohio, 1994). In the same pleading Petitioner buttressed his constitutional arguments with citations to *Lehr v. Robertson* 463 U.S. 248 (1983), and *Steven S. v. Deborah D.* 25 Cal. Rptr. 3d 482 (2005). (Memorandum Brief of Daryl D. Hendrix, p. 7,8).

The district court declined to find the statute unconstitutional, stating that "The public policy advanced appears to make good sense of advancing reproductive options and avoiding litigation while affording a method of protecting a donor's interests if he so desires. The public policy embodied in the statute does not appear to violate any Kansas or United States constitutional rights." (App. 72, 73). The district court further held that since there was no written agreement, it would find that Respondent had no responsibilities concerning the children. (App. 75).

B. Proceedings Before the Appellate Court of Kansas

While a timely notice of appeal had been filed, the Appellate Court of Kansas did not pass on the merits of this cause, as the Supreme Court of Kansas granted

a Motion to Transfer the Case directly to the Supreme Court of Kansas. (App. 67).

C. The Kansas Supreme Court Finds the Statute Constitutional

At the heart of the Kansas Supreme Court's ruling was the finding that there was a compelling state interest overriding Petitioner's claim to paternity, and the rights of the children to know and be supported by their father: "K.S.A. 38-1114(f) envisions that both married and unmarried women may become parents without engaging in sexual intercourse, either because of personal choice or because a husband or partner is infertile, impotent, or ill. **It encourages men who are able and willing to donate sperm to such women by protecting the men from later unwanted claims for support from the mothers or the children.** *It protects women recipients as well,* **preventing potential claims of donors to parental rights and responsibilities, in the absence of an agreement.** Its requirement that any such agreement be in writing enhances predictability, clarity, and enforceability. Although the timing of entry into a written agreement is not set out explicitly, the design of the statute implicitly encourages early resolution of the elemental question of whether a donor will have parental rights. Effectively, the parties must decide whether they will enter into a written agreement before any donation is made, while there is still balanced bargaining power on both sides of the parenting equation.In our view, the statute's gender classification substantially furthers and is

thus substantially related to these legitimate legislative purposes and important governmental objectives." (App. 33, 34). (emphasis added).

D. The Dissenting Opinions

In her dissent, Justice Caplinger took issue with the majority's holding that K.S.A.38-1114(f) passed constitutional muster because it included an opt-out provision, and that accordingly, Respondent's "own *inaction* before donating his sperm" left him unable to meet the statute's requirements of a written agreement. Justice Caplinger found this at the core of the constitutional problem with the statute, as fundamental rights must be actively waived, rather than passively lost due to inaction. Justice Caplinger observed that the Supreme Court has held that the Fourteenth Amendment "guarantees more than fair process" and "includes a substantive component that 'provides heightened protection against government interference with certain fundamental rights and liberty interests.' *Troxel v. Granville*, 530 U.S. 57, 65, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000). Justice Caplinger noted that it is well established that the right to parent is a fundamental right protected by the United States Constitution. See, *e.g.*, *Troxel*, 530 U.S. at 65-66, 120 S.Ct. 2054; *Stanley v. Illinois*, 405 U.S. 645, 651-52, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972). (App. 54)

Justice Caplinger also noted that the Supreme Court has further consistently held that courts must "indulge every reasonable presumption against waiver of fundamental constitutional rights." *Johnson v. Zerbst*,

304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege" and thus must result from a free and conscious choice. 304 U.S. at 464, 58 S.Ct. 1019. And, when faced with a waiver of a fundamental right, courts "do not presume acquiescence in the loss of fundamental rights." 304 U.S. at 464, 58 S.Ct. 1019; see also *Hodges v. Easton*, 106 U.S. (16 Otto) 408, 412, 1 S.Ct. 307, 27 L.Ed. 169 (1882) (right to trial by jury in a civil case is a fundamental right and every reasonable presumption must be indulged against its waiver). Justice Caplinger observed that the majority recognizes that K.S.A. 38-1114(f) permits a donor to waive his right to parent simply by his own inaction rather than through an intentional act relinquishing that right. For that reason, Justice Caplinger found that the statute's "escape clause" does not satisfy due process requirements. (App. 55).

Justice Caplinger noted that the majority's reliance on *Lehr v. Robertson* was misplaced: in that case the state's interests of maintaining a child in a stable two parent family relationship by way of an adoption argued in favor of application of the New York Putative Father Registry statute, which cut off a putative father's rights to parenthood as a result of his failure to register with the Putative Father registry. (App. 57). *See also Michael H. and Victoria D. v. Gerald D.* 491 U.S. 110 (1989) (upholding a state statute's presumption of legitimacy of a child born to a married couple against challenge against a biological father who had an extramarital affair with the child's mother, this Court holding that the state's interest in

the preservation of the existing marital and family unit is a more significant concern than a biological father's assertion of paternity). (App. 58, 59).

Justice Caplinger observed that unlike in *Lehr,* the Kansas Supreme Court was not faced with a situation in which an additional party seeks to assert parental rights, instead, only the biological father seeks to assert his rights to parent his children. Thus, Justice Caplinger observed, the need for a determination of parental rights does not exist in the same urgency that it exists in an adoption situation. (App. 59).

Justice Caplinger concluded that the application of the statute to the facts of this case was offensive to the Due Process Clause:

" A putative father has come forward to participate in the rearing of his children, emotionally and financially; consequently, his interest in doing so is entitled to full protection under the Due Process Clause. Instead of being given this protection and an opportunity to prove that he intended to actively parent his children, D.H. has been subjected to the workings of a statute of which he was unaware, that required him to "opt in" to fatherhood before ever donating his sperm, or be forever barred from parenting his children.

I strongly disagree with the majority's conclusion that D.H.'s own inaction, whether due to ignorance of the law or otherwise, constituted a waiver of his rights to parent. Because the rights to parent are fundamental, those rights may be waived only through an intentional, free, and meaningful choice. Here, the record indicates D.H. was not even aware of K.S.A. 38-

1114(f), much less its requirement that he must enter into a written agreement formalizing his intent to parent his child before he provided his sperm to S.H. I would find the statute's requirement that a known sperm donor affirmatively take action to preserve his fundamental rights to parent constituted a violation of due process as applied to D.H." (App. 60)

Justice Hill's dissent focused on the disenfranchisement of the children:

"The majority offers the children sympathy. But is this in their best interests? The trial court never got to the point of deciding the best interests of the children because it was convinced that such a consideration was barred by the operation of K.S.A. 38-1114(f) to a known donor. None of the elaborate and meticulous safeguards our Kansas laws afford parents *and children* in proceedings before our courts when confronted with questions of parentage have been extended to these children. A quick glance over our procedures dealing with the Kansas Parentage Act (K.S.A. 38-1110 *et seq.*) or our Code for Care of Children (K.S.A. 38-1501 *et seq.*) reveals the great caution we take in this state when courts must consider such relationships. While it is true that an attorney was appointed to represent the children in the original child in need of care case, the record from their point of view remains silent. Instead only the voices of mother and "semen donor" are heard in district court and this court as well." (App. 60).

REASONS FOR GRANTING THE PETITION

This case presents the Court with a much-needed opportunity to require that participants of assisted reproductive technologies follow the Constitution. With the most precious fundamental liberty interests at stake - the right to parent one's children, to be parented by one's parents, and the best interests of the children themselves, the Due Process and Equal Protection Clauses of the Fourteenth Amendment apply to everyone – mothers, fathers, and children have individual rights deserving of protection. As can be seen in the compilation of state statues set forth in the Appendix, guidance from this Court will prevent a systematic deprivation of due process rights of parents and children under circumstances which are likely to be repeated. (App. 79). As will be further examined below, various courts, under analogous circumstances, have reached diametrically different results. Consistency and predictability, without the sacrifice of fundamental rights argue for this Court's review.

Second, this case is also about Due Process safeguards due to individuals and how the courts below violated these Constitutional guarantees. On multiple occasions, the courts below denied D.H.'s rights to basic fair procedures and an opportunity to be heard in a meaningful way. He was denied standing by the district court at what for him was unquestionably the most crucial time of the case: when he could dispute through cross-examination the claims of the mother that the two of them had no agreement and when he could present evidence and witnesses to his claims that such an agreement existed. The denial of stand-

ing hampered and harmed D.H. throughout the process of his appeals. The opportunity to appeal does not replace the opportunity to present one's case in court.

If the Kansas Supreme Court's decision's statutory construction stands, courts in future cases will face a confusing, if not alarming, dilemma. Single mothers could have children by contract. Such mothers can choose and control whether or not their children have fathers. The benefits that children accrue from established paternity may be silently waived by parents whose interests are not congruent with those of the child, yet whose interests the government labels as "legitimate" or "important."

For decades the law has prohibited parents from bartering and contracting over their parental rights and the obligations owed to children. Now, what were once the problems to which paternity law was applied (e.g., namely, mothers unwilling to file for paternity on behalf of her child and a father unwilling to provide emotional and financial support for his progeny) are characterized as legitimate and important government interests. There is something fundamentally wrong with this picture.

Not since the line of unwed father's rights cases culminating in *Lehr v. Robertson*,463 U.S. 248, 103 S.Ct. 2985, 77 L.Ed. 2d 614 (1983), and the line of paternity cases culminating in *Clark v. Jeter*, 486 U.S. 456, 108 S.Ct. 1910, 100 L.Ed. 2d 465 (1988), has this Court had occasion to reinforce the government's *parens patriae* authority to protect the liberty interests of children and their relationships with their

fathers. The 1973 Uniform Parentage Act (UPA) affirmed the constitutional mandate to treat children equally by establishing that, "regardless of the marital status of the parents, all children and all parents have equal rights with respect to each other." The decision below threatens to undo the gains of both children and fathers when the children are born via artificial insemination.

Negotiations between the UPA Drafting Committee and the American Bar Association Individual Rights and Responsibilities Section (joined by the Unmet Legal Needs of Children) resulted in assurances that "a child born to an unmarried man and woman, including children born through assisted reproduction . . . should have the same rights and relationship with his or her parents or intended parents as a child born to a married couple." John Sampson, *Preface to the Amendments to the Uniform Parentage Act* (2002), 37 Fam. L. Q. 4 (2003). This promise, however, like the promise made in this case, has not been kept. Despite the requirement of 42 U.S.C. §666(a)(5)(L) (which stemmed from the Federal Support Act of 1988) that putative fathers must have a reasonable opportunity to initiate a paternity action in order for states to receive federal matching funds, the 2002 UPA states, "The donor can neither sue to establish parental rights, nor be sued and required to support the resulting child. In sum, donors are eliminated from the parental equation." See UPA (2002), section 702, cmt.

In light of the Kansas Supreme Court's disregard for the constitutional safeguards of the father and the two children in this case, in light of the need for the rights and interests of children to be protected by the state's

parens patriae authority, and in light of the destabilizing impact of this decision on fundamental constitutional guarantees to parental rights and paternity in the context of artificial insemination, this Court's authoritative guidance is badly needed.

I. CERTIORARI SHOULD BE GRANTED TO PROTECT A FATHER'S FUNDAMENTAL RIGHTS TO THE CARE, CUSTODY AND CONTROL OF HIS CHILDREN IN THE CONTEXT OF ARTIFICAL REPRODUCTION

A. A father's fundamental right to the care, custody, and control of his children is protected under the due process and equal protection clauses of the Fourteenth Amendment and cannot be deprived without a conscious, voluntary relinquishment or a judicial finding of unfitness.

1. The father's fundamental liberty interests in his parental rights to the care, custody, and control of his children.

The United States Supreme Court has upheld a parent's fundamental right to the care, custody, and control of their children. See *Troxel v. Granville*, 530 U.S. 57, 66 (2000). *Stanley v. Illinois* 405. U.S. 645 (1972), *Lehr v. Robertson* 463 U.S. 248 (1983) These fundamental liberty interests are protected by the Fourteenth Amendment that establishes that a state cannot "deprive any person of life, liberty, or property, without due process of law, nor deny any person

within its jurisdiction the equal protection of the laws." U.S. Constitution, Amendment XIV.

2. Fundamental constitutional rights cannot be waived by passive acquiescence.

In her dissent, Caplinger, J. notes that:

> The Supreme Court has consistently held that courts must "indulge every reasonable presumption against waiver of fundamental constitutional rights." *Johnson v. Zerbst*, 304 U.S. 458, 464, 82 L.Ed. 1461, 58 S.Ct. 1019 (1938). "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege" that must result from a free and conscious choice. 304 U.S. at 464. And, when faced with a waiver of a fundamental right, courts "do not presume acquiescence in the loss of fundamental rights." 304 U.S. at 464; see also *Hodges v. Easton*, 106 U.S. (16 Otto) 408, 412, 27 L.Ed. 169, 1 S.Ct. 307 (1882)(right to trial by jury in a civil case is a fundamental right and every reasonable presumption must be indulged against its waiver. *In re K.M.H.*, (App. 55).

The Fourteenth Amendment to the United States Constitution states that no State shall "deprive any person of life liberty, or property, without due process of law." The Supreme Court has held that the Fourteenth Amendment "guarantees more than fair process" and "includes a substantive component that 'provides heightened protection against government interference with certain fundamental rights and

liberty interests.'" *Troxel*, 530 U.S. at 65. Further, the Supreme Court has held that courts must "indulge every reasonable presumption against waiver of fundamental constitutional rights." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), 82 L.Ed. 1461, 58 S.Ct. 1019. "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." *Johnson*, 304 U.S. at 464. A person can waive a fundamental constitutional right so long as this waiver is voluntary, knowing, and intelligent. *Miranda v. Arizona*, 384 U.S.436, 475 (1966). It is the duty of all parties to ensure that a person's decision to waive a fundamental right is a free and meaningful decision. *DeLuca v. Ford*, 858 F.Supp.1330 (S.D.N.Y.1994). A person's fundamental rights are personal to him and must be the one who makes this ultimate decision as to whether he will waive his basic and fundamental rights. When faced with a waiver of fundamental right, courts "do not **presume** acquiescence in the loss of fundamental rights. *Johnson v. Zerbst*, 304 U.S. 458 (1938).

Respectfully, in its majority opinion, the Supreme Court of Kansas disregarded the precedent well-established by the highest court of the United States when determining whether D.H. "waived" his right to parent. The Kansas Court erred in its majority opinion finding that K.S.A. 38-1114(f) "establishes the clear default positions of parties to artificial insemination. If these parties desire an arrangement different from the statutory norm, they are free to provide for it, as long as they do so in writing. "(App. 34). The very fact that there is a "default" position involving a fundamental right is a constitutional violation and

does not follow the precedent consistently set forth by the United States Supreme Court. D.H. did not waive his fundamental right to parent his children. There is no written agreement between D.H. and S.H. that suggests that D.H. waived his parental rights to his children. There is no evidence to suggest there was an oral agreement between D.H. and S.H. that D.H. waived his fundamental right to parent his children. This court did not "indulge every reasonable presumption against waiver of fundamental constitutional rights" in this case as *Johnson* court. *Johnson v. Zerbst*, 304 U.S. 458 (1938). This court did not find that D.H.'s "waiver" was voluntary, knowing and intelligent as required by *Miranda*. *Miranda v. Arizona*, 384 U.S.436, 475 (1966). Instead, this court ***presumed*** that D.H. acquiesced to the loss of his parental rights by operation of K.S.A. 38-1114(f), contrary to the United States Supreme Court findings in *Johnson*. *Johnson v. Zerbst*, 304 U.S. 458 (1938). K.S.A. 38-1114(f), as written and interpreted by the Kansas court's majority opinion is unconstitutional as it deprives D.H's Fourteenth Amendment right to parent without due process of law, the Kansas court did not follow the precedent set forth by the United States Supreme Court in *Johnson v. Zerbst*, 304 U.S. 458 (1938) and *Miranda v. Arizona*, 384 U.S.436, 475 (1966). Instead the Kansas Supreme Court found that the default positions of the statute sufficiently afforded D.H. due process of law and disregarded *Miranda* and *Johnson*'s analysis of how a waiver of a fundamental right should be considered. D.H. did not voluntarily, knowingly and intelligently make a decision to waive his fundamental right to parent, and accordingly his due process rights were violated.

3. The rights of an unwed father cannot be terminated without an opportunity to be heard on the issue of parental fitness.

The father also cited to *Stanley v. Illinois*, the 1973 Supreme Court case holding that the rights of unwed father could not be terminated by presumption or without an opportunity to be heard on the issue of parental fitness. 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed. 2d 551 (1973).

In her dissent in the appellate court below, Justice Caplinger again explained:

> Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand.(App. 62).

II. THE KANSAS SUPREME COURT'S FLAWED EQUAL PROTECTION ANALYSIS, AND APPLICATION OF AN INCORRECT LEVEL OF SCRUTINY SETS AN IMPROPER PRECEDENT

The Fourteenth Amendment of the United States Constitution states that no state shall "deny any person within its jurisdiction the equal protection of the law." Not only does D.H. challenge the constitutionality of the statute as it applies to him, he chal-

lenges the constitutionality as it applies to known sperm donors who desire to be active fathers. The Kansas court mistakenly determined that D.H.'s equal protection challenge is gender-based only; however, the current categorization of "donor of sperm" as written and applied in this statute violates the equal protection of known donors who desire to be fathers. Such categorization interferes with a specific gender's fundamental right to family. Such categorization requires the application of strict scrutiny and not intermediate scrutiny.

Strict scrutiny is applied when the classification involves a suspect classification, i.e., race, ancestry, and alienage; or categorizations impinging upon a fundamental right, i.e., privacy, marriage, voting, traveling, and freedom of association. *Hoffman v. US*, 767 F.2d 1431, 1434 (Cal.1985) *citing* *McLaughlin v. Florida*, 379 U.S. 184, 191-92, 85 S.Ct. 283, 288, 13 L.Ed.2d 222 (1964), *Oyama v. California*, 332 U.S. 633, 644-46, 68 S.Ct. 269, 274-75, 92 L.Ed. 249 (1948), *Graham v. Richardson*, 403 U.S. 365, 372, 91 S.Ct. 1848, 1852, 29 L.Ed.2d 534 (1971), *Roe v. Wade*, 410 U.S. 113, 154-64, 93 S.Ct. 705, 727-32, 35 L.Ed.2d 147 (1973), *Zablocki v. Redhail*, 434 U.S. 374, 383-87, 98 S.Ct. 673, 679-81, 54 L.Ed.2d 618 (1978), *Bullock v. Carter*, 405 U.S. 134, 144, 92 S.Ct. 849, 856, 31 L.Ed.2d 92 (1972), *Shapiro v. Thompson*, 394 U.S. 618, 627, 89 S.Ct. 1322, 1327, 22 L.Ed.2d 600 (1969), *NAACP v. Alabama*, 357 U.S. 449, 460-62, 78 S.Ct. 1163, 1170-72, 2 L.Ed.2d 1488 (1958). To withstand strict scrutiny, a statute must be precisely tailored to serve a compelling state interest. *Hoffman v. US*, 767 F.2d 1431,1435.

Strict scrutiny most definitely is the proper test in this case because the statute impermissibly interferes with the exercise of a fundamental right to parent. Any father who knowingly donates his sperm to a known unmarried woman automatically has a fundamental right to parent when a child is conceived. It should not matter if the parties were sexually involved or if the parties choose artificial insemination to create a child. The court erred in determining that D.H.'s equal protection challenge is a solely gender-based. Not only does the statute discriminate between a woman's right and a father's right as a result of anatomy, it essentially allows a woman's right to parent trump a man's right to parent for the very same reason and interferes with the fundamental rights of fathers who choose to procreate by insemination. At a minimum, a known donor who voluntarily donates sperm to a known unmarried woman is fully aware of his actions and responsibilities if a child is conceived as a result of insemination. Once a child is born, both parents have the fundamental right to parent that child. Understanding the public policy behind the protection of unknown sperm donors and unmarried women desiring to be single parents, K.S.A. 38-1114(f) generally categorizes the unknown sperm donors and the known sperm donors into one statute and apply the protection of the unknown sperm donor to the know sperm donor. Although the statute is a blanket protection for the unknown sperm donors, it is a blanket bar to parenthood for known sperm donors who had the intent of exercising their fundamental right to parent.

Kansas is one of 25 states that has a statute addressing single parents' use of artificial insemination to conceive children. Kansas is one of five states that have included a writing requirement in its statute. The theory is that the writing requirement is that it protects the donor's Due Process rights. The facial validity of this statutory construction is both deceiving and open to deception. It assumes many things that are not always present – namely, logical decisions made in logical sequences as if everybody knew the law, everybody trusted one another, and nobody ever changed their mind. What looks like a simple binary decision (either there is a writing or there is not) that everybody would understand (either sign an agreement to be a parent or remain silent to not be a parent), that is done before anybody commits to anything (decision is made pre-insemination), and that is always something everyone remains forthright and honest about (everyone keeps their promises and tells the truth), is often far from any of these things. The statute interprets the absence of a written agreement as if there is no agreement, when in fact there had to be some kind of agreement between the parties in order for the mother to receive the semen. Any oral agreement between the parties for the father to waive his parental obligations would be unenforceable as against public policy; it would not be binding. Yet the statute's written agreement requirement appears to void any oral agreement to share parental obligations because it was not written down. When parents can agree, and when that agreement is not harmful to the child, parental agreement is enforced as in the best interests of the child. From the perspective of the child, the statute sanctions a "conspiracy of silence"

and "deliberate falsity" between the parents. In order to achieve the desires of unmarried mothers who wish to raise a child without a father, the Kansas statute requires both a "conspiracy of silence" and "deliberate falsity" between the mother and sperm donor. They must orally agree to waive the donor's parental rights and obligations, yet they must also act like there is no such agreement because any agreement would be unenforceable as against public policy. The Kansas Supreme Court recognized that D.H.'s fundamental rights were at stake but neither applied strict scrutiny consistent with this recognition, nor correctly characterized D.H.'s equal protection argument as based on comparisons to other unwed fathers rather than being gender-based, nor placed the appropriate burden on the party asserting the constitutionality of the statute to demonstrate a compelling state interest justifying the classification. The Kansas Supreme Court mischaracterized D.H.'s equal protection argument as gender-based . . . and it did so in a way that it later denies when this is claimed to be unconstitutional. For example, in its equal protection analysis, the Kansas Supreme Court states:

> K.S.A. 38-1114(f) draws a gender-based line between a necessarily female sperm recipient and a necessarily male sperm donor for an artificial insemination. By operation of the statute, the female is a potential parent or actual parent under all circumstances; by operation of the same statute, the male will never be a potential parent or actual parent unless there is a written agreement to that effect with the female. . . We also reject the

> argument from D.H. and the Center that the statute inevitably makes the female the sole arbiter of whether a male can be a father to a child his sperm helps to conceive. (App. 31-34).

Petitioner's equal protection claim is that he be treated like other unwed fathers. The parental rights of other unwed fathers can neither be limited to a pre-insemination opportunity to negotiate an agreement with the mother nor terminated without an explicit waiver or a showing of parental unfitness.

III. THE DECISION BELOW ABDICATES THE COURT'S ROLE AS PARENS PATRIE IN CONSIDERING THE BEST INTERESTS OF THE CHILDREN

Acting in the best interests of children is a part of the government's exercise of it's *parens patriae* authority in every other context involving children: artificial insemination should not be an exception. While the traditional presumption that parents act in the best interests of children applies to most situations, parents do not possess absolute and unreviewable discretion with respect to their children. *Parham v. J.R.*, 442 U.S. 584, 99 S.Ct. 2493, L.Ed. 2d 101 (1979)(holding that considerations of a child's rights limits parents from exercising absolute and unreviewable discretion). The Constitution's protects parents' fundamental liberty interests in the care, custody, and control of their children, but this Court has never held that the parents' interests should act as a rigid constitutional shield, protecting every arbitrary parental decisions from challenge. *Troxel v.*

Granville, 530 U.S. 57, 86, 120 S.Ct. 2054, 2072, 147 L.Ed. 2d 49, 68-9 (2000)(Stevens, J., dissent).

Limiting the father's opportunity (and hence, the child's opportunity) to establish parental rights during negotiations between the parents in a period pre-insemination does not present a reasonable opportunity for the child or someone with an interest in the child to assert claims on their behalf. *Clark v. Jeter*, 486 U.S. 456, 457, 108 S.Ct. 1910, 100 L.Ed. 2d 465 (1988). Indeed, the child is placed in a precarious position because his or her interests may not be congruent with those of either parent, particularly when they are encouraged to silently contract away the child's rights to his or her parentage.

This Court has held that, when a mother is unwilling to file a paternity action on behalf of her child to exercise the child's rights to his or her second parent, the mother's and the child's interests are no longer congruent. *Mills v. Habluetzel*, 456 U.S. 91, 102 S.Ct. 1549, 71 L.Ed. 2d 770 (1982). This Court has also held that a putative father "has no legitimate [protectable] right and certainly no liberty interest in avoiding financial obligations to his natural child that are imposed by state law." *Rivera v. Minnich*, 483 U.S. 574, 107 S.Ct. 3001, 97 L.Ed. 2d 473 (1987).

Indeed, if K.S.A. 38-1114(f) is held to allow the mother and father to contract away the child's paternity, it affords the child no opportunity at all. This is a patent violation of the child's rights to equal protection of the law.

This Court established a precedent that a child's rights to paternal support cannot be ignored or abdi-

cated in a series of three paternity cases in this Court during the 1980s.

First, the Court held that a Texas statute providing only one year for establishing paternity denied illegitimate children equal protection of law. *Mills v. Habluetzel*, 456 U.S. 91 (1982). Then the Court held that Tennessee's two year statute of limitations on paternity actions did not provide illegitimate children with an adequate opportunity to obtain support. The Court held this time limitation was not substantially related to the legitimate state interest in the litigation of stale or fraudulent claims and therefore violated certain children equal protection. *Pickett v. Brown*, 461 U.S. 1, 103 S.Ct. 2199, 76 L.Ed.2d 372 (1983). And finally, the Court struck down Pennsylvania's six-year statute of limitations on the establishment of paternity. *Clark v. Jeter*, 486 U.S. 456, 108 S.Ct. 1910, 100 L.Ed.2d 465 (1988).

In the latter case, Justice O'Connor wrote for a unanimous court and specifically addressed the possibility of a mother's unwillingness to assert a paternity claim on behalf of her child. O'Connor's opinion also reflected a view of paternity cases as a diverse class of different situations rather than as a simplified notion of a father having abandoned a mother and child.

> The 6-year statute of limitations violates the Equal Protection Clause. Under the heightened scrutiny analysis used in evaluating equal protection challenges to statutes of limitations that apply to illegitimate children's paternity suits, **the period**

> **for obtaining support must be sufficiently long to present a reasonable opportunity for those with an interest in illegitimate children to assert claims on their behalf, and any time limitation placed on that opportunity must be substantially related to the State's interest in avoiding the litigation of stale or fraudulent claims.** [emphasis added] [citing *Mills* and *Pickett*]. Under this analysis, it is questionable whether Pennsylvania's 6-year period is reasonable, since a mother may for years after her child's birth be unwilling to assert a claim due to her relationship with the natural father, . . . since a mother might realize only belatedly a loss of income attributable to the need to care for the child; and since financial difficulties are likely to increase as the child matures and incurs additional expenses. *Clark v. Jeter*, 486 U.S. 456-7, 108 S.Ct. 1910, 100 L.Ed.2d 465 (1988).

The dynamics of these relationships required careful problem solving. For example, when an unmarried couple lived together and the father supported the child, the filing of a paternity action might seem unnecessary and the filing of a paternity action might actually disrupt the relationship. Such a filing might be perceived as an indication that the mother was preparing to exit the relationship with the father. The opinion demonstrates a compelling state interest in a child's right to file a paternity petition and to attach child support obligations on natural fathers who had lived with the mothers and the children for several years, then decide to leave. To do otherwise would

create bizarre incentives where, for example, a father might stay with the mother and child until any statute of limitations expired, then leave without incurring child support obligations. This result would leave the mother alone to raise the child. The importance of having two parents cannot be overemphasized In a recent line of cases, the New York Courts have upheld a "paternity" action for support in failed relationships between lesbian lovers who had chosen to parent by means of anonymous sperm donation. H.M. v. E.T. 851 N.Y.S. 2d 58 (Unreported Disposition, New York Family Court, 2007), see also *Beth R. V. Donna* M. 2008 WL 61031 (N.Y. Sup. 2008) (female same sex partner granted standing to pursue custody and visitation, on basis of recognition of Canadian same sex marriage), see also *Browne v. D'Alleva* 2007 WL 4636692 (Conn Super. 2007) (granting standing to seek paternity to a known biological father who donated sperm to a lesbian couple).

IV. ALLOWING A MOTHER TO UNILATERALLY DENY A FATHER'S OPPORTUNITY FOR PATERNITY VIOLATES THE FATHER'S DUE PROCESS AND EQUAL PROTECTION SAFEGUARDS OF THE FOURTEENTH AMENDMENT BY EXPANDING HER DISCRETIONARY POWERS TO SECURE AN ABORTION WITHOUT PATERNAL INTERFERENCE, TO GRANT HER PRESUMED DISCRETIONARY POWERS TO TERMINATE THE FATHER'S PARENTAL RIGHTS AFTER THE BIRTH OF THE CHILDREN.

While the Kansas Supreme Court contends that the father's constitutional guarantee of an opportunity ends upon insemination, the Kansas Supreme Court also argues that, even if the father's opportunity interests survive post-conception, the statute remains constitutional because it is "consistent with United States Supreme Court precedent making even a married pregnant woman the sole arbiter, regardless of her husband's wishes, of whether she continues a pregnancy to term." See *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52, 69-71, 96 S.Ct. 2831, 49, L.Ed. 2d 788 (1976). (App. 38).

The Kansas Supreme Court's reference to a mother's right to unilateral decision making about an abortion, seen in the context of a case where a father attempted to establish rights to existing, viable children that had already been born, extends a mother's presumed discretionary power to an impermissible extent. (App. 38). The mother's unilateral authority to terminate her pregnancy relates to her decisions concerning her

carrying first an embryo, then a fetus. A fetus is not a constitutionally recognized person and has no constitutional rights prior to birth. *Roe v. Wade*, 401 U.S. 113, 93 S.Ct. 705, 35 L.Ed. 2d 147 (1973). Yet a state's interests encumber the mother's unilateral decision making process at the point of viability, or, in other words, precisely when her unborn progeny is no longer an embryo or fetus, but a child. (App 38) citing *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52, 69-71, 96 S.Ct. 2831, 49, L.Ed. 2d 788 (1976).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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March, 2008

DISTRICT CASE NO. 05 JC372+ SN

IN THE SUPREME COURT OF OF THE STATE OF KANSAS

JEFFREY M. LEVING
LAW OFFICES OF JEFFREY M. LEVING LTD.
19 SOUTH LASALLE ST
SUITE 450
CHICAGO, IL 60603 CASE NO. 06-96102-AS

In the Interest of:
K.M.H
A CHILD UNDER EIGHTEEN
IN THE MATTER OF THE PATERNITY OF:
K.C.H. AND K.M.H. BY AND THROUGH
THEIR NEXT FRIEND, DARYL D. HENDRIX,
APPELLANT,
AND
SAMANTHA HARRINGTON, APPELLEE.

THE COURT HAS TAKEN THE FOLLOWING ACTION:

MOTION FOR REHEARING OR MODIFICATION BY DDH.CONSIDERED BY THE COURT AND DENIED. CORRECTIONS NOTED.

CONSOLIDATED WITH SN CASES 05JC373 & O5D1223

DATE: 12/18/2007 CAROL G. GREEN
CLERK

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 96,102

In the Interest of K.M.H., a child under age eighteen,

and K.C.H., a child under age eighteen.

In the Matter of the Paternity of K.C.H. and K.M.H.,

by and through their next friend,

D.H., *Appellant*, and S.H., *Appellee*.

SYLLABUS BY THE COURT

1. When reviewing an appeal from summary judgment, an appellate court must view the evidence in the light most favorable to the nonmoving party. A judgment for the moving party should be affirmed on appeal if there remains no genuine issue of material fact for trial and the case is appropriate for disposition in that party's favor as a matter of law.

2. The factors relevant to a constitutional choice-of-law determination include the procedural or substantive nature of the question involved, the residence of the parties involved, and the interest of the State in having its law applied. As long as Kansas has significant contact or a significant aggregation of contacts to ensure that the choice of Kansas law is not arbitrary or unfair, constitutional limits are not violated. To the extent a case involves a contractual dispute, Kansas courts apply the Restatement (First) of Conflict of

Laws § 332 (1934), and the doctrine of *lex loci contractus, i.e.*, the law of the state where the contract is made governs. A contract is made where the last act necessary for its formation occurs.

3. Generally the party seeking to apply the law of a jurisdiction other than the forum has the burden to present facts sufficient to show that other law should apply. Failure to present facts sufficient to determine where a contract is made may justify a default to forum law.

4. On the facts of this case, where the parties are Kansas residents; any agreement that existed between them was arrived at in Kansas; promises supported by consideration were exchanged in Kansas and delivered upon in Kansas; and the subject children were born in Kansas and reside in Kansas, Kansas law applies, despite the fact that the artificial insemination resulting in the children's conception was performed at a Missouri clinic.

5. An appellate court's review of whether a statute is constitutional raises a question of law reviewable de novo. The constitutionality of a statute is presumed; all doubts must be resolved in favor of its validity, and it must clearly appear that the statute violates the Constitution before it can be invalidated.

6. The guiding principle of equal protection analysis is that similarly situated individuals should be treated

alike. A statutory gender classification is subject to intermediate, or heightened, scrutiny. In order to pass muster under the federal and state equal protection provisions, a classification that treats otherwise similarly situated individuals differently based solely on the individuals' genders must substantially further a legitimate legislative purpose; the government's objective must be important, and the classification substantially related to achievement of it.

7. The requirement of K.S.A. 38-1114(f) that any opt-out agreement between an unmarried mother and a known sperm donor intended to avoid the statutory bar against the paternity of the donor must be in writing does not result in an equal protection or due process violation.

8. When called upon to interpret a statute, an appellate court first attempts to give effect to the intent of the legislature as expressed through the language enacted. When a statute is plain and unambiguous, the court does not speculate as to the legislative intent behind it and will not read the statute to add something not readily found in it. The court need not resort to statutory construction. It is only if the statute's language or text is unclear or ambiguous that the court moves to the next analytical step, applying canons of construction or relying on legislative history to effect the legislature's intent.

9. K.S.A. 38-1114(f) does not require a sperm donor to provide his sperm directly to a physician performing an artificial insemination.

10. Under the facts of this case, a child in need of care petition and a paternity petition did not, either individually or together, satisfy the K.S.A. 38-1114(f) requirement of a written agreement between the parties.

11. A specific statute controls over a general statute. Likewise, a specific provision within a statute controls over a more general provision within the statute. K.S.A. 38-1114(f) is more specific to cases involving artificial insemination using donor sperm than the general presumption of paternity set out in K.S.A. 38-1114(a)(4).

12. Under the facts of this case, the sperm donor may not pursue equitable arguments not pursued in the district court or in his opening appellate brief. Moreover, the appellate record contains no evidence to support his assertions of nefarious conduct by the recipient.

Appeal from Shawnee district court; ROBERT J. SCHMISSEUR, assigned judge. Opinion filed October 26, 2007. Affirmed.

Kurt L. James, of Topeka, argued the cause and was on the briefs for appellant.

Susan Barker Andrews, of Topeka, argued the cause and was on the briefs for appellee.

Linda Henry Elrod, Distinguished Professor of Law and Director, of Topeka, was on the brief for *amicus curiae* Washburn University School of Law Children and Family Law Center.

Timothy M. O'Brien, of Shook Hardy & Bacon. L.L.P., of Overland Park, was on the brief for *amicus curiae* Family Law Professors.

The opinion of the court was delivered by

BEIER, J.: This appeal from a consolidated child in need of care (CINC) case and a paternity action arises out of an artificial insemination leading to the birth of twins K.M.H. and K.C.H. We are called upon to decide the existence and extent of the parental rights of the known sperm donor, who alleges he had an agreement with the children's mother to act as the twins' father.

The twins' mother filed a CINC petition to establish that the donor had no parental rights under Kansas law. The donor sued for determination of his paternity. The district court sustained the mother's motion to dismiss, ruling that K.S.A. 38-1114(f) was controlling and constitutional. That statute provides:

"The donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the birth father of a child thereby conceived, unless agreed to in writing by the donor and the woman." K.S.A. 38-1114(f).

Factual and Procedural Background

Many of the underlying facts are undisputed. The mother, S.H., is an unmarried female lawyer who wanted to become a parent through artificial insemination from a known donor. She was a friend of the donor, D.H., an unmarried male nonlawyer, who agreed to provide sperm for the insemination. Both S.H. and D.H. are Kansas residents, and their oral arrangements for the donation occurred in Kansas, but S.H. underwent two inseminations with D.H.'s sperm in Missouri.

D.H. accompanied S.H. to a Missouri clinic for the first procedure and provided the necessary sperm to medical personnel. The first procedure did not result in a pregnancy. D.H. did not accompany S.H. to Missouri for the second procedure. Instead, he provided the sperm to S.H., and she delivered it to the Missouri physician responsible for the insemination. The second procedure resulted in S.H.'s pregnancy and the birth of the twins.

There was no formal written contract between S.H. and D.H. concerning the donation of sperm, the artificial insemination, or the expectations of the parties with regard to D.H.'s parental rights or lack thereof.

The twins were born on May 18, 2005. The day after their birth, S.H. filed a CINC petition concerning the twins, seeking a determination that D.H. would have no parental rights. The petition identified D.H. as "[t]he minor children's father" and alleged that the twins were in need of care "as it relates to the father" and that "the [f]ather should be found unfit and his

rights terminated." The petition continued to refer to D.H. throughout as the twins' father.

On May 31, 2005, D.H. filed an answer to the CINC petition and filed a separate paternity action acknowledging his financial responsibility for the children and claiming parental rights, including joint custody and visitation. The CINC and paternity actions were consolidated. S.H. filed a motion to dismiss the paternity action, invoking K.S.A. 38-1114(f). After the motion was filed, the district judge raised questions concerning choice of law and the constitutionality of the statute and ordered the parties to brief these issues along with the other issues arising out of the motion to dismiss.

In her brief, S.H. argued Kansas law should apply because her original oral agreement with D.H. took place in Kansas; the parties reside in Kansas; the sperm resulting in the pregnancy was given to her by D.H. in Kansas; and the children reside in Kansas. In her view, the single fact that the procedure was performed by a doctor in Missouri did not constitute a significant contact with that state, and Missouri did not have a sufficient ongoing interest in the parties or in the subject matter of their dispute.

On the merits, S.H. principally relied upon K.S.A. 38-1114(f). S.H. argued that her CINC petition did not constitute her written assent to D.H.'s parental rights under K.S.A. 38-1114(f). She also asserted that the mutual preinsemination intent of the parties–as a single mother-to-be and a sperm donor only, not as co-parents–was clear from their actions during the pregnancy. According to S.H., she sought out fertility

tests and treatments on her own; D.H. did not attend the second procedure or sonograms or other prenatal medical appointments; and he did not provide emotional support or financial assistance during the pregnancy or after the twins' birth. She also argued that D.H. was morally, financially, and emotionally unfit to be a father.

In his arguments in the district court, D.H. maintained that he had standing to file his paternity action as the biological father of K.M.H. and K.C.H. On choice of law, D.H. argued that Kansas conflict principles required the court to look to the place of either contract formation or contract performance. He asserted that the "more sensible" approach in this case would be to apply the law of the state where performance occurred, which was, according to him, where the artificial insemination was performed. D.H. said Missouri has no statute barring a presumption of paternity for a known sperm donor for an unmarried woman; paternity is proved by "consanguinity or genetic test." D.H. also asserted that no doctor would perform an insemination on an unmarried woman in Topeka, Lawrence, or Kansas City, Kansas, and suggested a Kansas doctor could have had a duty to discuss the legal implications of the procedure under Kansas law while a Missouri doctor would not.

In the event the court held that Kansas law governed, D.H. argued that K.S.A. 38-1114(f) unconstitutionally deprived him of his right to care, custody, and control of his children and violated public policy "support[ing] the concept of legitimacy and the concomitant rights of a child to support and inheritance." If the statute is constitutional, he asserted, its dictate

of nonpaternity of a sperm donor should not apply to him because he had provided his sperm to S.H. rather than to a licensed physician. He also cited the CINC petition's identification of him as the twins' "father" and its faulting of him for failing to do things consistent with parenthood. D.H. asserted the wording of the CINC petition was evidence of the parties' mutual intent to take themselves out from under the statutory provision for nonpaternity. He also contended that he had offered financial assistance and attempted to visit the children in the hospital after their birth and on subsequent occasions, but that he was prevented from doing so by S.H.

The district judge ruled that Kansas law governed, that K.S.A. 38-1114(f) was constitutional and applicable, and that the CINC petition did not constitute a written agreement departing from the provision for nonpaternity set forth in the statute. The judge therefore granted S.H.'s motion, concluding as a matter of law that D.H. had no legal rights or responsibilities regarding K.M.H. and K.C.H.

Issues on Appeal

On appeal, both parties reiterate the arguments they made to the district court, and D.H. alleges for the first time that another statutory provision and equity favor his side of the case. We therefore address six issues: (1) Did the district judge err in ruling that Kansas law would govern? (2) Did the district judge err in holding K.S.A. 38-1114(f) constitutional under the Equal Protection and Due Process Clauses of the Kansas and the federal Constitutions? (3) Did the

district judge err in interpreting and applying the "provided to a licensed physician" language of K.S.A. 38-1114(f)? (4) Did the district judge err in determining that the CINC petition did not satisfy the requirement of a writing in K.S.A. 38-1114(f)? (5) Did K.S.A. 38-1114(a)(4) grant D.H. parental rights? and (6) Does equity demand reversal of the district court?

On this appeal, we also have the benefit of briefs from two *amici curiae*–one from the Washburn University School of Law's Children and Family Law Center (Center), which argues that K.S.A. 38-1114(f) is unconstitutional as applied to *known* sperm donors, and one from family law professors Joan Heifetz Hollinger, *et al.*, who argue that K.S.A. 38-1114(f) is constitutional and that it should be applied consistently with its plain language to bar D.H.'s assertion of paternity.

Standing and Standard of Review

The parties do not appear to dispute D.H.'s standing to bring a paternity action at this stage in the proceedings, but we note briefly as a preliminary matter that his standing is not in serious doubt. K.S.A. 38-1115(a)(1) permits a child "or any person on behalf of such a child" to bring a paternity action "to determine the existence of a father and child relationship presumed under K.S.A. 38-1114." It is D.H.'s position that his fatherhood of the twins should be presumed under the statute.

Regarding standard of review, each of the issues raised on appeal presents a pure question of law reviewable de novo by this court. *Kluin v. American*

Suzuki Motor Corp., 274 Kan. 888, 893, 56 P.3d 829 (2002). Although S.H.'s motion was titled "Motion to Dismiss," the district judge considered materials beyond the pleadings, essentially treating the motion as one for summary judgment. We are therefore mindful of our often-stated standard of review following summary judgment in the district court: We must view the evidence in the light most favorable to the nonmoving party, D.H. See *Wachter Management Co. v. Dexter & Chaney, Inc.*, 282 Kan. 365, 368, 144 P.3d 747 (2006). The district court's judgment for the moving party, S.H., should be affirmed on appeal if there remains no genuine issue of material fact for trial and the case is appropriate for disposition in her favor as a matter of law. See K.S.A. 60-256; *Scott v. Hughes*, 281 Kan. 642, 644, 132 P.3d 889 (2006); *Kluin*, 274 Kan. at 893.

Choice of Law

The United States Supreme Court has held:

"In deciding constitutional choice-of-law questions, whether under the Due Process Clause or the Full Faith and Credit Clause, this Court has traditionally examined the contacts of the State, whose law was applied, with the parties and with the occurrence or transaction giving rise to the litigation. [Citation omitted.] In order to ensure that the choice of law is neither arbitrary nor fundamentally unfair [citation omitted], the Court has invalidated the choice of law of a State which has had no significant contact or significant aggregation of contacts, creating state interests, with the parties and the occurrence or

transaction." *Allstate Ins. Co. v. Hague,* 449 U.S. 302, 308, 66 L. Ed. 2d 521, 101 S. Ct. 633 (1981).

Various factors are relevant to a choice-of-law determination, including the procedural or substantive nature of the question involved, the residence of the parties involved, and the interest of the State in having its law applied. *Sun Oil Co. v. Wortman,* 486 U.S. 717, 736, 100 L. Ed. 2d 743, 108 S. Ct. 2117 (1988) (Brennan, J., concurring). "'As long as Kansas has "'significant contact or [a] significant aggregation of contacts' . . . to ensure that the choice of Kansas law is not arbitrary or unfair," constitutional limits are not violated.' [Citations omitted.]" *Brenner v. Oppenheimer & Co.*, 273 Kan. 525, 534, 44 P.3d 364 (2002); see *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 818, 86 L. Ed. 2d 628, 105 S. Ct. 2965 (1985) (citing *Allstate Ins. Co. v. Hague,* 449 U.S. at 312-13); *Dragon v. Vanguard Industries, Inc.*, 277 Kan. 776, 790, 89 P.3d 908 (2004). Also, to the extent this case is viewed as a contractual dispute, Kansas courts apply the Restatement (First) of Conflict of Laws § 332 (1934), and the doctrine of *lex loci contractus, i.e.*, the law of the state where the contract is made governs. See *ARY Jewelers v. Krigel,* 277 Kan. 464, 481, 85 P.3d 1151 (2004); *Wilkinson v. Shoney's, Inc.*, 269 Kan. 194, 209-10, 4 P.3d 1149 (2000); *Foundation Property Investments v. CTP,* 37 Kan. App. 2d 890, Syl. ¶ 4, 159 P.3d 1042 (2007); *Layne Christiansen Co. v. Zurich Canada,* 30 Kan. App. 2d 128, 141-42, 38 P.3d 757 (2002). A contract is made where the last act necessary for its formation occurs. *ARY Jewelers,* 277 Kan. at 481-82; *Wilkinson,* 269 Kan. at 210; *Founda-*

tion Property Investments, 37 Kan. App. 2d at 894-95; *Layne Christiansen Co.*, 30 Kan. App. 2d at 141-43.

"Generally the party seeking to apply the law of a jurisdiction other than the forum has the burden to present sufficient facts to show that other law should apply. Failure to present facts sufficient to determine where the contract is made may justify a default to forum law." *Layne Christensen Co.*, 30 Kan. App. 2d at 143-44. In addition, we note that Kansas courts have often leaned toward a *lex fori,* or law of the forum, approach, opting to apply Kansas law absent a clear showing that another state's law should apply. See *Dragon*, 277 Kan. at 790; *Systems Design v. Kansas City P.O. Employees Cred. Union,* 14 Kan. App. 2d 266, 269, 788 P.2d 878 (1990). Moreover, our Court of Appeals has recognized in a case focused on the legitimacy of a child that, "[i]n our current mobile society, place of conception of child carries little weight [in choice of law determination]." *In re Adoption of Baby Boy S.*, 22 Kan. App. 2d 119, 126, 912 P.2d 761, *rev. denied* 260 Kan. 993, *cert. denied* 519 U.S. 870 (1996). Instead,"[w]hether a child is legitimate is determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the child and the parent"; considerations include "the relative interests of those states in the determination of the particular issue," "the protection of justified expectations," "the basic policies underlying the particular field of law," and the "certainty, predictability and uniformity of result." Restatement (Second) of Conflict of Laws § 6, § 287 (1) & comment d (1969).

D.H. urges us to follow the lead of the Illinois Supreme Court in *In Re Marriage of Adams*, 133 Ill. 2d 437, 447, 551 N.E.2d 635 (1990), which applied the law of the state where an insemination was performed because it would "fulfill the participants' expectations and . . . help insure predictability and uniformity of result."

In *Adams*, a husband and wife had been Florida residents; their consultations concerning fertility options occurred in Florida; the artificial insemination from an anonymous donor was performed by a Florida doctor in his Florida clinic; and the baby was born in Florida and was a Florida resident until the wife moved herself and the child to her parents' home in Illinois and then filed for divorce. The husband sought a determination of nonpaternity, and the court determined that Florida law should govern because Florida had a more significant relationship than Illinois to the parentage dispute. 133 Ill. 2d at 447.

The facts of this case bear little resemblance to the facts of *Adams*. Here, the parties are Kansas residents. Whatever agreement that existed between the parties was arrived at in Kansas, where they exchanged promises supported by consideration, and D.H. literally delivered on his promise by giving his sperm to S.H. The twins were born in Kansas and reside in Kansas. The only fact tying any of the participants to Missouri is the location of the clinic where the insemination was performed.

Under these circumstances, we hold that Kansas law applies and that significant contacts and a significant aggregation of contacts with Kansas make application

of our law to the parties' claims not only appropriate but also constitutional. This choice is neither arbitrary nor unfair; neither party would have been justified in expecting Missouri to have a controlling interest as to any dispute between them.

Constitutionality of K.S.A. 38-1114(f)

In his brief, D.H. makes a general allegation that K.S.A. 38-1114(f) offends the Constitution. The cases he cites in support discuss both the Equal Protection Clause and the Due Process Clause; we thus presume his challenge relies upon each of these provisions. See U.S. Const. amend. XIV; Kan. Const. Bill of Rights, §§ 2, 18. At oral argument before this court, D.H. conceded that his rights under these provisions do not differ as between the federal and state Constitutions. He also acknowledged that he no longer challenges the statute as unconstitutional on its face; rather, he argues it cannot be constitutionally applied to him, as a known sperm donor who alleges he had an oral agreement with the twins' mother that granted him parental rights. The *amicus* brief filed by the Center further clarifies that the constitutional challenge before us is only to the statute as applied to D.H.

The Center insists the statute deprives D.H. of parental rights without due process of law and without a required finding of unfitness. It urges us to dispense with a literal reading of the statute's language, invoking the purported purpose of the Kansas Parentage Act, K.S.A. 31-1110 *et seq.*, to encourage fathers to acknowledge paternity and child support obligations voluntarily. It also emphasizes that courts

should seek a result geared to the best interests of the child, in this case advancing a public policy favoring the right of every child to two parents, regardless of the means of the child's conception.

As mentioned in summary above, our review of whether a statute is constitutional raises a question of law reviewable de novo. *In re Tax Appeal of CIG Field Services Co.*, 279 Kan. 857, 866-67, 112 P.3d 138 (2005). In addition,

"'[t]he constitutionality of a statute is presumed. All doubts must be resolved in favor of its validity, and before the act may be stricken down it must clearly appear that the statute violates the constitution. In determining constitutionality, it is the court's duty to uphold a statute under attack rather than defeat it. If there is any reasonable way to construe the statute as constitutionally valid, that should be done. A statute should not be stricken down unless the infringement of the superior law is clear beyond substantial doubt.' [Citations omitted]." *State v. Rupnick*, 280 Kan. 720, 736, 125 P.3d 541 (2005).

Given the relative newness of the medical procedure of artificial insemination, and thus the newness of K.S.A. 38-1114(f)'s attempt to regulate the relationships arising from it, it is not surprising that the issue raised by D.H. is one of first impression, not only in Kansas but nationally. We therefore begin our discussion of the constitutionality of the statute by surveying the landscape of various states' laws governing the rights of sperm donors for artificial insemination. This landscape and its ongoing evolution provide helpful context for our analysis of K.S.A. 38-1114(f).

The majority of states that have enacted statutes concerning artificial insemination state that the husband of a married woman bears all rights and obligations of paternity as to any child conceived by artificial insemination, whether the sperm used was his own or a donor's. See, *e.g.*, Ala. Code § 26-17-21(a) (1992) ("If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived."); see also Cal. Fam. Code § 7613(a) (West 2004) (same); Colo. Rev. Stat. § 19-4-106(1) (West 2005) (same); Ill. Comp. Stat. ch. 750 40/3(a) (West 1999) (same); Minn. State § 257.56 Subd. 1 (2007); Mo. Rev. Stat. 210.824(1) (2000) (same); Mont. Code Ann. § 40-6-106(1) (2005); Nev. Rev. Stat. § 126.061(1) (2005) (same); N.J. Stat. Ann. § 9:17-44(a) (2002) (same); N.M. Stat. Ann. § 40-11-6(A) (Michie 2006) (same); Ohio Rev. Code Ann. § 3111.95(A) (Anderson 2003) (similar); Wis. Stat. § 891.40(1) (2005-06) (same). Further, several of these states' statutes provide that a donor of semen used to inseminate a married woman will not be treated in law as the father of any child conceived, if he is not the woman's husband. See, *e.g.*, Ala. Code § 26-17-21(b) (1992) ("The donor of semen provided to a licensed physician for use in artificial insemination of a married woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived."); Minn. Stat. § 257.56 Subd. 2 (2007) (same); Mo. Rev. Stat. § 210.824(2) (2000) (same); Mont. Code Ann. § 40-6-106(2) (2005) (same); Nev. Rev. Stat. § 126.061 (2) (2005) (same). One court has

observed that these two rules protect the expectations of the married couple, the best interests of the child, and the expectations of the donor. See *People v. Sorensen*, 68 Cal. 2d 280, 284-88, 66 Cal. Rptr. 7, 437 P.2d 495 (1968).

The 1973 Uniform Parentage Act, promulgated by the National Conference of Commissioners on Uniform State Laws, 9B U.L.A. 377 (2001), provided the model for many of the state artificial insemination statutes that incorporate these two rules. See, *e.g.*, Cal. Fam. Code § 7613; N.M. Stat. Ann. § 40-11-6. Section 5 of the original uniform Act provided:

"(a) If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived. The husband's consent must be in writing and signed by him and his wife. The physician shall certify their signatures and the date of the insemination, and file the husband's consent with the [State Department of Health], where it shall be kept confidential and in a sealed file. However, the physician's failure to do so does not affect the father and child relationship. All papers and records pertaining to the insemination, whether part of the permanent record of a court or of a file held by the supervising physician or elsewhere, are subject to inspection only upon an order of the court for good cause shown.

"(b) The donor of semen provided to a licensed physician for use in artificial insemination of a *married* woman other than the donor's wife is treated in

law as if he were not the natural father of a child thereby conceived." (Emphasis added.) Uniform Parentage Act (1973) § 5; 9B U.L.A. at 407-08.

The wording of this original Act and statutes that imitated it did not address the determination of a sperm donor's paternity when an *unmarried* woman conceived a child through artificial insemination. The earliest case to address this particular question arose in a state that had not yet adopted any statute regarding the effects of the procedure.

In that case, *C.M. v. C.C.*, 152 N.J. Super. 160, 377 A.2d 821 (1977), a sperm donor filed a paternity suit, seeking parental rights to a child born when the child's unmarried mother artificially inseminated herself with the donor's sperm. In that case, the mother and the donor had been in a long-standing romantic relationship; the donor testified they were contemplating marriage; the mother wanted a child but did not want to have sexual intercourse before marriage; and the insemination procedure was performed at the mother's home. Three months into the pregnancy, the mother ended her relationship with the donor, and she refused him access to the child after its birth.

The New Jersey court relied upon a common-law presumption of paternity to award visitation rights to the donor as the "natural father" of the "illegitimate child." Had the mother and the donor been married and conceived the child through artificial insemination, the court said, the donor would have been considered the child's father. Given the evidence that the parties had intended to parent the child together, the

court believed the same result should follow, despite the absence of wedding vows. 152 N.J. Super. at 165-68.

Certain states other than New Jersey either anticipated the need for their original statutes to govern the relationship of a sperm donor to the child of an unmarried recipient as well as a married recipient or modified their original uniform Act-patterned statutes to remove the word "married" from the § 5 (b) language. This meant these states' statutes contained complete bars to paternity for any sperm donor not married to the recipient, regardless of whether the recipient was married to someone else and regardless of whether the donor was known or anonymous. An example of such a provision reads: "The donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived." See, *e.g.*, Cal. Fam. Code § 7613(b) (West 2004); Ill. Comp. Stat. ch. 750 40/3(b) (West 1999); Wis. Stat. § 891.40(2) (2005-06) (same); see also Colo. Rev. Stat. § 19-4-106(2) (West 2005) (substantially similar); Conn. Gen. Stat. § 45a-775 (2007) (similar); Idaho Code § 39-5405 (2002) (similar); Ohio Rev. Code Ann. § 3111.95(B) (Anderson 2003) (same); Va. Code Ann. § 20-158(A) (3) (2004) (substantially similar).

Four cases interpreting one of these types of statutes covering both married and unmarried recipients and establishing an absolute bar to donor paternity were decided before a 2000 amendment to the uniform Act made it applicable to unmarried as well as married recipients of donor sperm. See Uniform Parentage Act (2000); 9B U.L.A. 295 (West 2001).

The first of the four arose in California in 1986. In that case, *Jhordan C. v. Mary K.*, 179 Cal. App. 3d 386, 224 Cal. Rptr. 530 (1986), a donor provided sperm to one of two unmarried women who had decided to raise a child together. California had adopted the language of the 1973 Uniform Act with the exception that it had omitted the word "married" in the second subsection. *Jhordan C.*, 179 Cal. App. 3d at 392 (citing then-existing Cal. Civ. Code § 7005 [West 1979], which now appears, substantially unchanged, in Cal. Fam. Code § 7613 [West 2004]). As the court put it:

"[T]he California Legislature has afforded unmarried as well as married women a statutory vehicle for obtaining semen for artificial insemination without fear that the donor may claim paternity, and has likewise provided men with a statutory vehicle for donating semen to married and unmarried women alike without fear of liability for child support. Subdivision (b) states only one limitation on its application: the semen must be 'provided to a licensed physician.' Otherwise, whether impregnation occurs through artificial insemination or sexual intercourse, there can be a determination of paternity with the rights, duties and obligations such a determination entails." *Jhordan C.*, 179 Cal. App. 3d at 392.

Because the parties had no doctor involved in the donation or insemination and thus the sperm was never "provided to a licensed physician," the court ruled that the case before it fell outside the statute. It therefore affirmed the lower court's recognition of the donor's paternity. *Jhordan C.*, 179 Cal. App. 3d at 398. Although the court addressed its ruling's impact

on the constitutional rights of the two women, it did not address any constitutional implications for the donor. *Jhordan C.*, 179 Cal. App. 3d at 395-96.

The second case, *In Interest of R.C.*, 775 P.2d 27 (Colo. 1989), arose in Colorado in 1989. In that case, the district court had refused to admit proffered evidence of an agreement that the donor would act as a father based on relevance; it granted the unmarried mother's motion to dismiss the donor's paternity suit based on Colorado's statute. The Colorado provision, like that in California, applied to both married and unmarried recipients and contained a blanket bar to donor parental rights. See Colo. Rev. Stat. § 19-4-106).

The Colorado Supreme Court reversed the district court and remanded for findings of fact. It explicitly rejected the idea that an unmarried recipient lost the protection of the statute "merely because she knows the donor." *R.C.*, 775 P.2d at 35. And it did not reach the equal protection and due process challenges raised by the donor. However, it concluded the statute was ambiguous and refused to apply its absolute bar to paternity because the known donor had produced evidence of an oral agreement that he would be treated as father of the child. *R.C.*, 775 P.2d at 35.

The next case, *McIntyre v. Crouch*, 98 Or. App. 462, 780 P.2d 239 (1989), *cert. denied* 495 U.S. 905 (1990), involved an unmarried woman who artificially inseminated herself with a known donor's semen. The donor sought recognition of his paternity, and both he and the woman sought summary judgment. The Oregon artificial insemination statute read:

"If the donor of semen used in artificial insemination is not the mother's husband: (1) Such donor shall have

no right, obligation or interest with respect to a child born as a result of the artificial insemination; and (2) A child born as a result of the artificial insemination shall have no right, obligation or interest with respect to the donor." Ore. Rev. Stat. § 109.239 (1977).

The donor challenged this statute under equal protection and due process principles. He swore out an affidavit in support of summary judgment and argued he had relied on an agreement with the mother that he "would remain active" in the child's life and "participate in all important decisions concerning the child." 98 Or. App. at 464. He sought visitation and said that he was willing and able to accept the same level of responsibility for the support, education, maintenance, and care of the child and for pregnancy-related expenses that he would have had if the child had been born from his marriage to its mother. The district court ruled that the donor's paternity claim was barred by the Oregon statute.

The *McIntyre* court began its analysis by reciting its equal protection standard of review, which was strict scrutiny, a standard more searching than that applied to such claims in Kansas. See generally *State v. Limon*, 280 Kan. 275, 283-87, 122 P.3d 22 (2005) (equal protection challenge based on gender discrimination does not require strict scrutiny, *i.e.*, showing classification necessary to serve compelling state interest; rather, court applies intermediate scrutiny, *i.e.*, classification must substantially further legitimate legislative purpose); see *Chiles v. State*, 254 Kan. 888, 891-93, 869 P.2d 707, *cert. denied* 513 U.S. 850 (1994); *Farley v. Engelken*, 241 Kan. 663, 669, 740 P.2d 1058 (1987). The Oregon court stated: "A statute

that gives a privilege to women while denying it to men is inherently suspect and subject to strict scrutiny, unless the classification (1) is based on specific biological differences between men and women and (2) is rationally related to the purposes of the statute." *McIntyre*, 98 Or. App. at 469.

Under this standard, the Oregon court ruled that the statute before it drew an acceptable "classification of unmarried males and unmarried females . . . based on biological differences . . . . Only a male could contribute the sperm to accomplish conception; only a female could conceive and bear the child." 98 Or. App. at 469-470. Further, the classification was rationally related to the purposes of the statute, which were: (1) to allow married couples to have children, even though the husband was infertile, impotent, or ill; (2) to allow an unmarried woman to conceive and bear a child without sexual intercourse; (3) to resolve potential disputes about parental rights and responsibilities: that is, (a) the mother's husband, if he consents, is father of the child, and (b) an unmarried mother is free from any claims by the donor of parental rights; (4) to encourage men to donate semen by protecting them against any claims by the mother or the child; and (5) to legitimate the child and give it rights against the mother's husband, if he consented to the insemination. 98 Or. App. at 467-68, 470. Thus the statute did not offend equal protection either on its face or as applied.

The court also rebuffed the donor's due process challenge to the statute on its face. 98 Or. App. at 470. However, the donor also argued that the statute violated due process under the federal and state

Constitutions as applied to him, a known donor who had an agreement with the mother to share the rights and responsibilities of parenthood. The court agreed the statute would violate the Due Process Clause of the Fourteenth Amendment as applied to the donor *if* such an agreement was proved. 98 Or. App. at 470-72.

On this point, the court looked to *Lehr v. Robertson,* 463 U.S. 248, 261, 77 L. Ed. 2d 614, 103 S. Ct. 2985 (1983), an adoption case. *Lehr* dealt with the necessity of notice of pending adoption proceedings to an unwed father who had not filed with New York's putative father registry and had never established a substantial relationship with the child. The Court stated:

"When an unwed father demonstrates a full commitment to the responsibilities of parenthood by 'com[ing] forward to participate in the rearing of his child,' [citation omitted], his interest in personal contact with his child acquires substantial protection under the Due Process Clause. . . . But the mere existence of a biological link does not merit equivalent constitutional protection." *Lehr*, 463 U.S. at 261 (quoted in *McIntyre*, 98 Or. App. at 470).

The *Lehr* Court ultimately held that the State's failure to notify the father of adoption proceedings did not deny him due process of law. 463 U.S. at 264-65. No substantive due process right to care, custody, and control of the child had vested in a man who could demonstrate nothing more than a biological link to his offspring. 463 U.S. at 258-62. The *Lehr* Court noted, however, that an unwed father who demonstrated "a full commitment to the responsibilities of parenthood" could not be absolutely barred from asserting his

parental rights without a violation of due process. 463 U.S. at 261.

The *McIntyre* court reasoned that the Due Process Clause should afford no less protection to a sperm donor who had facilitated artificial insemination than an unwed father, "provided that [the sperm donor] could prove the facts" in his summary judgment affidavit that tended to support the existence of an agreement with the mother and his reliance upon it. Because the court concluded the constitutionality of the Oregon statute as applied to this donor would turn on whether he was given an opportunity to establish those facts, summary judgment in favor of the mother was reversed. 98 Or. App. at 472.

The last of the four cases, *C.O. v. W.S.*, 64 Ohio Misc. 2d 9, 639 N.E.2d 523 (1994), also concluded, as the *McIntyre* court did, that a statute purporting to be an absolute bar to paternity of sperm donors, while constitutional in the absence of an agreement to the contrary, could be unconstitutional as applied when the donor can establish that an agreement to share parenting existed between him and the unmarried woman who was the recipient of the sperm. 64 Ohio Misc. 2d at 12.

In *C.O.*, the Ohio statute at issue stated: "If a woman is the subject of a non-spousal artificial insemination, a donor shall not be treated in law or regarded as the natural father of a child conceived as a result of the artificial insemination, and a child so conceived shall not be treated in law or regarded as the natural child of the donor." See Ohio Rev. Code Ann. § 3111.95 (Anderson 2003). The statute also

required artificial insemination to be conducted under the supervision of a physician. 64 Ohio Misc. 2d at 10-11. As in *Jhordan C.*, an unmarried woman had inseminated herself with a known donor's sperm. Although the court ultimately determined the statute was inapplicable because the mother had failed to comply with the physician involvement requirement, it further opined that the statute would violate due process if applied to the donor, because he and the mother, at the time of the procedure, had agreed there would be a relationship between the donor and the child. 64 Ohio Misc. 2d at 12.

Since the Uniform Act was amended in 2000 to state simply, "A donor is not a parent of a child conceived by means of assisted reproduction," two of our sister states have decided three additional cases addressing statutes with identical or substantively indistinguishable provisions governing sperm donors and unmarried recipients. *Steven S. v. Deborah D.*, 127 Cal. App. 4th 319, 25 Cal. Rptr. 3d 482 (2005); *In re H.C.S.*, 219 S.W.3d 33 (Tex. App. 2006); *In re Sullivan*, 157 S.W.3d 911 (Tex. App. 2005).

Two of these cases come from Texas. They do not add much to the legal landscape with which we are concerned in this appeal because their outcomes were driven by standing, not an issue before us. See *H.C.S.*, 219 S.W.3d 33 (known donor lacked standing to pursue parentage adjudication; child conceived through assisted reproduction by unmarried donor's sister's same-sex partner using donor's sperm); *Sullivan*, 157 S.W.3d 911 (known donor had standing to maintain paternity action; parties had signed

preinsemination agreement stating donor would be treated as if he, mother were married).

The third case, *Steven S.*, 127 Cal. App. 4th 319, from California, involved an unmarried woman and a known sperm donor who tried artificial insemination; when that resulted in a miscarriage, they attempted to conceive through sexual intercourse, also without success. Finally, a second artificial insemination attempt resulted in conception. The donor initially was very involved with the pregnancy and the child, and he filed a paternity action when the child was 3 years old.

The district court noted that California's statute presented a bar to paternity for unmarried sperm donors, but ruled in favor of the donor based on equitable estoppel. The donor was known; he had engaged in sexual intercourse with the unwed mother; and she had acknowledged him as the child's father and had allowed him to participate in the pregnancy and celebrate the birth of the child. The California Court of Appeals reversed, holding that the "words of [Cal. Fam. Code] section 7613, subdivision (b) are clear" and that, under such facts, "[t]here can be no paternity claim" because of the statute's absolute bar. *Steven S.*, 127 Cal. App. 4th at 326.

None of these three decisions raised or reached the equal protection or due process challenges raised by the donor here.

Where does our Kansas statute fit into this landscape and its ongoing evolution?

In 1985, Kansas became one of the states that adopted portions of the Uniform Parentage Act of 1973

regarding presumptions of paternity, but it did not adopt any provision relating to artificial insemination. See L. 1985, ch. 114, sec. 5 (H.B. 2012).

In 1994, Kansas amended its statute to incorporate the 1973 Uniform Act's § 5(b) as K.S.A. 38-1114(f). See L. 1994, ch. 292, sec. 5 (Subst. H.B. 2583). It did not differentiate between known and unknown or anonymous donors, but it did make two notable changes in the uniform language.

As discussed above, although the 1973 Uniform Act governed the paternity of children born only to married women as a result of artificial insemination with donor sperm, the version adopted by Kansas omitted the word "married." See K.S.A. 38-1114(f). This drafting decision demonstrates the legislature's intent that the bar to donor paternity apply regardless of whether the recipient was married or unmarried.

The other alteration in the 1973 Uniform Act's language is directly at issue here. The Kansas Legislature provided that a sperm donor and recipient could choose to opt out of the donor paternity bar by written agreement. See K.S.A. 38-1114(f). The legislative record contains no explanation for this deviation from the 1973 Uniform Act's language. See Minutes of the House Judiciary Committee, January 19, 1994, and February 25, 1994.

This second drafting decision is critical and sets this case apart from all precedent. Our statute's allowance for a written agreement to grant a sperm donor parental rights and responsibilities means that, although we may concur with the *McIntyre* and *C.O.* courts in their constitutional analyses of absolute-bar

statutes, we need not arrive at the same result. K.S.A. 38-1114(f) includes exactly the sort of escape clause the Oregon and Ohio courts found lacking–and unconstitutional–in their statutes.

Ultimately, in view of the requirement that we accept as true D.H.'s evidence supporting existence of an oral agreement, we are faced with a very precise question: Does our statute's requirement that any opt-out agreement between an unmarried mother and a known sperm donor be "in writing" result in an equal protection or due process violation? Although several other states have adopted statutes like K.S.A. 38-1114(f), including language permitting an unmarried woman and a sperm donor to avoid the statutory bar and provide for the paternity of the donor through an "agreement in writing"–see Ark. Code Ann. § 9-10-201 (2002); Fla. Stat. § 742.14 (2005); N.H. Rev. Stat. Ann. § 168-B:3(I)(e) (2002); N.J. Stat. Ann. § 9:17-44(b) (2002); N.M. Stat Ann. § 40-11-6(B) (2006)–none of the courts of these states has yet subjected such a statute to a constitutional crucible. We do so now, as K.S.A. 38-1114(f) is applied to D.H.

Equal Protection

K.S.A. 38-1114(f) draws a gender-based line between a necessarily female sperm recipient and a necessarily male sperm donor for an artificial insemination. By operation of the statute, the female is a potential parent or actual parent under all circumstances; by operation of the same statute, the male will never be a potential parent or actual parent unless there is a written agreement to that effect with the female. As

discussed with counsel for the parties at oral argument before this court, the male's ability to insist on father status effectively disappears once he donates sperm. Until that point, he can unilaterally refuse to participate unless a written agreement on his terms exists. After donation, the male cannot force the fatherhood issue. The female can unilaterally decide if and when to use the donation for artificial insemination and can unilaterally deny any wish of the male for parental rights by refusing to enter into a written agreement.

The guiding principle of equal protection analysis is that similarly situated individuals should be treated alike. *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439, 87 L. Ed. 2d 313, 105 S. Ct. 3249 (1985); *State v. Limon*, 280 Kan. 275, 283, 122 P.3d 22 (2005). In Kansas, as before the United States Supreme Court, statutory gender classifications such as this classification in K.S.A. 38-1114(f) are subject to intermediate, or heightened, scrutiny. *Limon*, 280 Kan. at 283-87; *Chiles*, 254 Kan. at 891-93; *Farley*, 241 Kan. at 669; see *Reed v. Reed*, 404 U.S. 71, 76-77, 30 L. Ed. 2d 225, 92 S. Ct. 251 (1971). In order to pass muster under the federal and state equal protection provisions, a classification that treats otherwise similarly situated individuals differently based solely on the individuals' genders must substantially further a legitimate legislative purpose; the government's objective must be important, and the classification substantially related to achievement of it. *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 729, 155 L. Ed. 2d 953, 123 S. Ct. 1972 (2003); *United*

States v. Virginia, 518 U.S. 515, 533, 135 L. Ed. 2d 735, 116 S. Ct. 2264 (1996); *Farley*, 241 Kan. at 669.

Given the biological differences between females and males and the immutable role those differences play in conceiving and bearing a child, regardless of whether conception is achieved through sexual intercourse or artificial insemination, we are skeptical that S.H. and D.H. are truly similarly situated. However, assuming for purposes of argument that they are, we perceive several legitimate legislative purposes or important governmental objectives underlying K.S.A. 38-1114(f).

As the *McIntyre* Court observed about the Oregon statute, K.S.A. 38-1114(f) envisions that both married and unmarried women may become parents without engaging in sexual intercourse, either because of personal choice or because a husband or partner is infertile, impotent, or ill. It encourages men who are able and willing to donate sperm to such women by protecting the men from later unwanted claims for support from the mothers or the children. It protects women recipients as well, preventing potential claims of donors to parental rights and responsibilities, in the absence of an agreement. Its requirement that any such agreement be in writing enhances predictability, clarity, and enforceability. Although the timing of entry into a written agreement is not set out explicitly, the design of the statute implicitly encourages early resolution of the elemental question of whether a donor will have parental rights. Effectively, the parties must decide whether they will enter into a written agreement before any donation is made, while

there is still balanced bargaining power on both sides of the parenting equation.

In our view, the statute's gender classification substantially furthers and is thus substantially related to these legitimate legislative purposes and important governmental objectives. K.S.A. 38-1114(f) establishes the clear default positions of parties to artificial insemination. If these parties desire an arrangement different from the statutory norm, they are free to provide for it, as long as they do so in writing. Encouraging careful consideration of entry into parenthood is admirable. Avoidance of the limbo in which D.H. finds himself is a worthy legislative goal. We therefore hold that the application of K.S.A. 38-1114(f) to D.H. does not violate equal protection.

Due Process

Neither D.H. nor the Center explicitly addresses whether the due process challenge to K.S.A. 38-1114(f) in this case is based on procedural due process principles or substantive due process doctrine. Nor did the Oregon or Ohio courts that decided *McIntyre* and *C.O.* draw this distinction or comment upon it. See 98 Or. App. at 471-72; 64 Ohio Misc. 2d at 12. To the extent D.H.'s due process argument is couched in procedural language, *i.e.*, that K.S.A. 38-1114(f)'s requirement of a writing, strictly interpreted, denies him "a meaningful opportunity to be heard" on the claim that there was, in fact, an oral agreement, we simply disagree. Indeed, for purposes of ruling on the propriety of the district judge's summary disposition in favor of S.H., we accept D.H.'s evidence that there was an oral

agreement. Still, he has been denied no procedural right to which he was entitled; the statute merely sets up a burden of proof that his own inaction before donating his sperm left him unable to meet.

D.H.'s ignorance of the statute's requirement of a writing to record any agreement between him and S.H. as to his parental rights does not necessitate a ruling that the statute cannot be constitutionally applied to him. See *Jhordan C. v. Mary K.*, 179 Cal. App. 3d 386, 389, 224 Cal. Rptr. 530 (1986) (court analyzes applicability of artificial insemination statute despite parties' ignorance of it); see also *Lehr v. Robertson*, 463 U.S. 248, 264, 77 L. Ed. 2d 614, 103 S. Ct. 2985 (1983) (failure to file with putative father registry out of ignorance of law insufficient reason to criticize law itself); *State ex rel. Murray v. Palmgren*, 231 Kan. 524, 536, 646 P.2d 1091 (1982) (ignorance of the law is no excuse). It is apparent to us that the only potentially meritorious due process argument before us focuses on the assertion of D.H.'s fundamental right to care, custody, and control of his children. This raises a substantive due process concern, rather than a problem over the absence of a specific procedural protection. Indeed, if anything, D.H. and the Center advocate for *less* rather than *more* formality in process; they regard the requirement of a writing to memorialize any agreement between a sperm donor and a recipient as so heavy a procedural burden that it tips the constitutional scales in favor of D.H. here.

In addition to relying on *McIntyre* and *C.O.*, which, as previously discussed, addressed complete-bar statutes unlike our own, D.H. and the Center emphasize the United States Supreme Court's decision in

Lehr. See 463 U.S. at 261. *Lehr*'s facts limit its utility here. As mentioned above, that case involved an unwed biological father petitioning to set aside an order of adoption based on his failure to be notified of the adoption proceedings. A New York statute guaranteed protection of any interest such a putative father could have in assuming a responsible role in the future of his child: The father in *Lehr* had failed to avail himself of this protection and had taken no other action that would have established a protectable interest in the child. While a state may not absolutely bar a biological parent from asserting parental rights–the proposition for which D.H. and the Center cite *Lehr*–Kansas has not done so. Even a sperm donor with no relationship to a child's mother can forge and protect his parental rights by insisting on a written agreement.

D.H. and the Center argue that D.H.'s other efforts to assert his entitlement to and intention to exercise parental rights–stymied, they say, by S.H.–should be enough. S.H., of course, casts D.H.'s behavior in a considerably less favorable light. Again, however, for purposes of review of the district judge's summary deposition in S.H.'s favor, we accept D.H.'s version of events. The infirmity in his substantive due process argument does not lie in those factual allegations for which he has provided evidence in the record, including his allegation of an oral agreement; the infirmity lies in the absence of any proof of an agreement with S.H. *in writing*.

We simply are not persuaded that the requirement of a writing transforms what is an otherwise constitutional statute into one that violates D.H.'s substantive

due process rights. Although we agree with the Center that one goal of the Kansas Parentage Act as a whole is to encourage fathers to voluntarily acknowledge paternity and child support obligations, the obvious impact of the plain language of this particular provision in the Act is to prevent the creation of parental status where it is not desired or expected. To a certain extent, D.H. and the Center evidently misunderstand the statute's mechanism. It ensures no *attachment* of parental rights to sperm donors in the absence of a written agreement to the contrary; it does not *cut off* rights that have already arisen and attached.

We are confident this legislative design realizes the expectation of unknown or anonymous sperm donors, whether their motive for participation in artificial insemination is altruistic or financial. To the extent it does not realize the expectation of a known sperm donor, the statute tells him exactly how to opt out, how to become and remain a father. If, as the Center argues, genetic relationship must be destiny, then an anonymous donor with no intention to be a father would nevertheless automatically become one. It is evident to us the legislature chose an alternate arrangement. Neither D.H. nor the Center has convinced us there is a constitutional mandate for this court to make an independent policy choice.

We also reject the argument from D.H. and the Center that the statute inevitably makes the female the sole arbiter of whether a male can be a father to a child his sperm helps to conceive. This may be true, as we discussed above, once a donation is made, a recipient who becomes pregnant through artificial insemination using that donation can refuse to enter into an

agreement to provide for donor paternity. This does not make the requirement of written agreement unconstitutional. Indeed, it is consistent with United States Supreme Court precedent making even a married pregnant woman the sole arbiter, regardless of her husband's wishes, of whether she continues a pregnancy to term. See *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52, 69-71, 49 L. Ed. 2d 788, 96 S. Ct. 2831 (1976). As discussed above, before a donation is made, a prospective donor has complete autonomy to refuse to facilitate an artificial insemination unless he gets an agreement in writing to his paternity terms. This is more than most fathers, wed or unwed to their children's mothers, can ever hope for. See Note and Comment, *A Tale of Three Women: A Survey of the Rights and Responsibilities of Unmarried Women Who Conceive by Alternative Insemination And A Model for Legislative Reform*, 19 Am. J. L. & Med. 285, 304 (1993) (absence of executed writing evidence donor failed to, in words of *Lehr*, "grasp opportunity" to parent; chance to condition donation upon execution of agreement puts donor in control). The requirement that a sperm donor's and recipient's agreement be in writing does not violate D.H.'s due process rights.

All of this being said, we cannot close our discussion of the constitutionality of K.S.A. 38-1114(f) without observing that all that is constitutional is not necessarily wise. We are mindful of, and moved by, the Center's advocacy for public policy to maximize the chance of the availability of two parents–and two parents' resources–to Kansas children. We are also aware of continued evolution in regulation of artificial

insemination in this and other countries. In particular, Britain and The Netherlands now ban anonymous sperm donations, near-perfect analogs to donations from known donors who will have no role beyond facilitating artificial insemination. These shifts formally recognize the understandable desires of at least some children conceived through artificial insemination to know the males from whom they have received half of their genes. The Human Fertilisation and Embryology Authority Act of 1990, as amended by Disclosure of Donor Information, Regulations 2004 No. 1511 (requiring, effective April 2005, British donors' identities to be made available to donor-conceived children when children become 18); Netherlands Embryos Bill, Article 3 Dutch Ministry of Health, Welfare, and Sport (2004) www.minvws.nl/en (effective June 2004, child born using donated sperm have right to obtain information about biological father at age 16). As one such child recently wrote,

"[t]hose of us created with donated sperm won't stay bubbly babies forever. We're all going to grow into adults, and form opinions about the decision to bring us into the world in a way that deprives us of the basic right to know where we came from, what our history is and who both our parents are."

Clark, *My Father was an Anonymous Sperm Donor*, The Washington Post, December 17, 2006, at B01 (also currently available at http://www.washingtonpost.com/wp-dyn/content/article/2006/12/15/AR2006121501820.html). We sympathize. However, weighing of the interests of all involved in these procedures as well as the public policies that are furthered by favoring one or another

in certain circumstances, is the charge of the Kansas Legislature, not of this court.

"Provided to a Licensed Physician"

D.H.'s next argument on appeal is that the district judge erred in applying K.S.A. 38-1114(f) to him because his sperm was not "provided to a licensed physician," as required by the statute. Instead, it was provided to S.H., who, in turn, provided it to the medical personnel who performed the insemination.

D.H. opens this argument by citing a Kansas Court of Appeals case involving a petition to terminate the rights of a putative father for the proposition that "[s]tatutes pertaining to adoption, relinquishment, or termination of parental rights are strictly construed as they affect a parent's liberty interest in the custody and control of his or her children." *In re J.A.C.*, 22 Kan. App. 2d 96, Syl. ¶ 3, 911 P.2d 825 (1996). This case has no influence on our de novo standard of review here. As discussed at length with regard to the constitutionality of K.S.A. 38-1114(f), absent a written agreement to the contrary, D.H. is not a putative father. He is a sperm donor only. His link to the twins is purely, and solely, biological. It does not give rise to a constitutionally protected right. See *Lehr*, 463 U.S. at 261.

When we are called upon to interpret a statute, we first attempt to give effect to the intent of the legislature as expressed through the language enacted. When a statute is plain and unambiguous, we do not speculate as to the legislative intent behind it and will not read the statute to add something not readily

found in it. We need not resort to statutory construction. It is only if the statute's language or text is unclear or ambiguous that we move to the next analytical step, applying canons of construction or relying on legislative history construing the statute to effect the legislature's intent. See *CPI Qualified Plan Consultants, Inc. v. Kansas Dept. of Human Resources*, 272 Kan. 1288, 1296, 38 P.3d 666 (2002); *State v. Robinson*, 281 Kan. 538, 539-40, 132 P.3d 934 (2006).

Again, K.S.A 38-1114(f) states in pertinent part: "The donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the birth father of a child . . . ." D.H.'s argument focuses on the phrase "provided to licensed physician," essentially reading it to say "*directly and personally* provided to a licensed physician" or "provided to a licensed physician *by the donor*." This argument lacks merit.

The language of the statute is clear and unambiguous, and we will not add to it, as D.H. suggests. The words "the donor" form the subject of the predicate "is treated as if he were not the birth father." The lengthy dependent clause "provided to a licensed physician for use in artificial insemination of a woman other than the donor's wife" modifies "semen." K.S.A. 38-1114(f) does not require the donor *himself* to provide his sperm to the physician performing the insemination. It requires only that the donor's sperm be provided to the physician by *an unspecified someone or something*. The fact that S.H. was that someone here did not prevent application of the statute to this situation.

"Unless Agreed to in Writing"

Assuming arguendo the constitutionality and applicability of K.S.A. 38-1114(f), D.H. next argues that the statute's requirement of a written agreement should be deemed satisfied by the CINC petition filed by S.H. or by the CINC petition and his paternity petition, read together. He asserts that the statute sets forth no requirement that a written agreement be entered into at or before the time of the insemination and points out that the CINC petition referred to him "56 times" as the twins' "father." S.H. argues that there was no "meeting of the minds" between her and D.H. regarding coparenting and that the pleadings evidence none.

There is no technical definition of "agreed to" or "writing" in the Kansas Parentage Act of which K.S.A. 38-1114(f) is a part. Although these words or forms of them are defined elsewhere in Kansas statutes, see, *e.g.*, K.S.A. 2006 Supp. 84-1-201(3) (defining "agreement" as used in Kansas version of Uniform Commercial Code); K.S.A. 2006 Supp. 84-1-201(46) (defining "written," "writing" as used in same), these definitions, by their terms, are inapplicable. We therefore give these words as used in K.S.A. 38-1114(f) the meaning accorded them in everyday English. See *GT, Kansas, L.L.C. v. Riley County Register of Deeds*, 271 Kan. 311, 316, 22 P.3d 600 (2001).

When we do so, there can be no doubt that the pleadings filed by the parties are "in writing." However, interpreting them separately or together to prove the parties "agreed to" D.H.'s status as a father would require Lewis Carroll's looking glass. The absence of

such an agreement necessitated the drafting and filing of the pleadings in the first place. Their existence and substance do not memorialize accord, rather, its opposite. A CINC petition to terminate D.H.'s parental rights under K.S.A. 38-1531 may have been an odd procedural vehicle for effecting S.H.'s desire–a court order stating that D.H. never acquired any parental rights under K.S.A. 38-1114(f). A declaratory judgment action might have been better suited to her legal position. But she and her counsel were in uncharted waters. We will not hold that the pleadings constitute a written agreement by operation of law.

Parental Rights Under K.S.A. 38-1114(a)(4)

In the final paragraphs of his brief on appeal, D.H. argues that this case should be controlled by K.S.A. 38-1114(a)(4) rather than K.S.A. 38-1114(f). K.S.A. 38-1114(a)(4) provides:

"(a) A man is presumed to be the father of a child if:

. . . .

"(4) The man notoriously or in writing recognizes paternity of the child, including but not limited to a voluntary acknowledgment made [by amendment of birth certificate] in accordance with K.S.A. 38-1130 or [filing of birth certificate under K.S.A.] 65-2409a, and amendments thereto."

In his brief before the district court, D.H. attempted to reserve "the right to make claims based on ratification, estoppel, and common law," but this specific contention under K.S.A. 38-1114(a)(4) was never raised below. Nevertheless, given the status of this

case as one of first impression and the potential for denial of fundamental rights, see *In re M.M.L.*, 258 Kan. 254, 261, 900 P.2d 813 (1995), we address its merit.

A specific statute controls over a general statute. See *State ex rel. Tomasic v. Unified Gov. of Wyandotte Co./Kansas City*, 264 Kan. 293, 311, 955 P.2d 1136 (1998). Likewise, a specific provision within a statute controls over a more general provision within the statute. K.S.A. 38-1114(f) is far more specific to cases involving artificial insemination by a sperm donor such as D.H. than the general presumption of paternity set out in K.S.A. 38-1114(a)(4). D.H.'s claim under K.S.A. 38-1114(a)(4) is without merit.

Equity

For the first time in his appellate reply brief, D.H. asserts that the district court must be reversed because S.H. has "unclean hands." In essence, he argues that he, a nonlawyer, was tricked by lawyer S.H., who failed to inform him of the statute and failed to explain how the absence of independent legal advice or a written agreement could affect his legal rights. He asserts that he asked S.H. about whether he needed a lawyer or whether they should put their arrangement in writing and was told neither was necessary. This behavior, he alleges, may have constituted a violation of S.H.'s ethical duties as a licensed lawyer.

Despite D.H.'s attempt in his district court brief to reserve "the right to make claims based on ratification, estoppel, and common law," this invocation of

equity was never further preserved for review by pursuit in the district court or by inclusion in his opening appellate brief. See *McGinley v. Bank of America, N.A.*, 279 Kan. 426, 444, 109 P.3d 1146 (2005) (issue not briefed by appellant deemed waived, abandoned); *Titterington v. Brooke Insurance*, 277 Kan. 888, Syl. ¶ 3, 89 P.3d 643 (2004) ("[a] point raised only incidentally in a party's brief but not argued in the brief is deemed abandoned"); *Board of Lincoln County Comm'rs v. Nielander*, 275 Kan. 257, 268, 62 P.3d 247 (2003) (issue not raised in district court not preserved for appellate court). Even if we would nonetheless be inclined to reach its merit, given the posture of the case and the fundamental nature of the rights in play, we also are prevented from doing so by an inadequate appellate record of the underlying facts. See *State ex rel. Stovall v. Alivio*, 275 Kan. 169, 172, 61 P.3d 687 (2003) (duty of party to furnish appellate record sufficient to enable review of issue). D.H. never proffered evidence to support his assertions of nefarious conduct by S.H. The evidence he presented to the district court focused only on the existence of an oral agreement and his efforts at support; even assuming all of this evidence to be true, it is insufficient under what we have held is a constitutional statute.

Generally speaking, mere ignorance of the law is no excuse for failing to abide by it. *State ex rel. Murray v. Palmgren*, 231 Kan. 524, 536, 646 P.2d 1091 (1982). There may be a case in the future in which a donor can prove that the existence of K.S.A. 38-1114(f) was concealed, or that he was fraudulently induced *not* to obtain independent legal advice or *not* to enter into a

written agreement to ensure creation and preservation of his parental rights to a child conceived through artificial insemination. This is not such a case.

Affirmed.

ALLEGRUCCI, NUSS, LUCKERT, and ROSEN, JJ, not participating.

LOCKETT, J., Retired, CAPLINGER and HILL, JJ, assigned.[1]

[1]**REPORTER'S NOTE:** Justice Tyler C. Lockett, Retired, was appointed to hear case No. 96,102 vice Justice Allegrucci pursuant to the authority vested in the Supreme Court by K.S.A. 20-2616. Judge Nancy L. Caplinger and Judge Stephen D. Hill, of the Kansas Court of Appeals, were appointed to hear case No. 96,102 vice Justices Luckert and Rosen respectively pursuant to the authority vested in the Supreme Court by K.S.A. 20-3002(c).

McFARLAND, C.J., concurring: I agree with the majority's conclusion that K.S.A. 38-1114(f) is constitutionally permissible and operates to bar D.H. from asserting parental rights relative to the twins K.M.H. and K.C.H.

I think it is helpful to consider subsection (f) in context with other provisions of K.S.A. 38-1114. The statute is lengthy and states the presumptions of paternity in various factual situations. Illustrative thereof is the following excerpt:

"(a) A man is presumed to be the father of a child if:

"(1) The man and the child's mother are, or have been, married to each other and the child is born during the marriage or within 300 days after the marriage is terminated by death or by the filing of a journal entry of a decree of annulment or divorce.

"(2) Before the child's birth, the man and the child's mother have attempted to marry each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is void or voidable and:

(A) If the attempted marriage is voidable, the child is born during the attempted marriage or within 300 days after its termination by death or by the filing of a journal entry of a decree of annulment or divorce; or

(B) if the attempted marriage is void, the child is born within 300 days after the termination of cohabitation.

"(3) After the child's birth, the man and the child's mother have married, or attempted to marry, each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is void or voidable and:

(A) The man has acknowledged paternity of the child in writing;

(B) with the man's consent, the man is named as the child's father on the child's birth certificate; or

(C) the man is obligated to support the child under a written voluntary promise or by a court order.

"(4) The man notoriously or in writing recognizes

paternity of the child, including but not limited to a voluntary acknowledgment made in accordance with K.S.A. 38-1130 or 65-2409a, and amendments thereto.

"(5) Genetic test results indicate a probability of 97% or greater that the man is the father of the child." K.S.A. 38-1114(a).

The statute further provides:

"(b) A presumption under this section may be rebutted only by clear and convincing evidence, by a court decree establishing paternity of the child by another man or as provided in subsection (c). If a presumption is rebutted, the party alleging the existence of a father and child relationship shall have the burden of going forward with the evidence.

. . . .

"(e) If a presumption arises under this section, the presumption shall be sufficient basis for entry of an order requiring the man to support the child without further paternity proceedings." K.S.A. 38-1114(b), (e).

The bulk of the statute is concerned with establishing presumptions as to the paternity of a child. These are presumptions that may be rebutted. Subsection (f) is the final provision of that statute and is in stark contrast to the rest of the statute. No presumption is involved therein. Subsection (f) states:

"(f) The donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the birth father of a child thereby conceived, unless agreed to in writing by the donor and the woman." K.S.A. 38-1114(f).

The biological father of a child conceived under the circumstance described therein is to be treated in law as not being the birth father, absent an agreement in writing.

To come under the statute, an unmarried woman must desire to be impregnated by artificial insemination in a procedure by a licensed physician. She could elect to have an anonymous donor from a sperm bank. The statute would bar the donor from the rights of parentage even if his identity were later determined. If the woman elects to ask an acquaintance to be the donor and he agrees, he has no parentage rights unless the parties agree thereto in writing. If the parties agree in writing, the donor is assuming not only the privileges associated with parenthood but the possible financial burden of child support for 18 years or so. The man might feel flattered to be asked to be the donor and even be assured no child support would ever be sought. Without the statute, the donor would likely have no defense to child support claims asserted by the mother or the child.

Under the statute, absent an agreement in writing, the prospective mother would truly become a single parent upon a successful pregnancy, having assumed all parental privileges, duties, and obligations to any child born as a result of the artificial insemination. If the donor she sought out wants to assume parental privileges and responsibilities, and the prospective mother does not want this and will not agree, the would-be donor can say no deal and walk away. There is no child and no issue as to future rights and/or duties of the would-be donor. The prospective mother can seek out a sperm bank, another artificial insemi-

nation donor, proceed in some other manner outside the subsection, or abandon the idea of pregnancy. The subsection (f) provision appears to be aimed at protecting both parties from unwanted duties and/or obligations being imposed without their consent in the very limited factual situation to which it applies.

Further, as the majority notes, it is not ruling out the possibility that some future factual situation might result in the statutory bar being held inapplicable under those specific facts.

CAPLINGER, J., dissenting: I respectfully disagree with the majority's analysis of the constitutionality of K.S.A. 38-1114(f) as applied to D.H. I would hold the statute unconstitutional as applied to D.H. for the reason that it violates his fundamental right to parent his children without due process of law.

In reaching its conclusion that K.S.A. 38-1114(f) comports with due process, the majority analyzes at least two extra-jurisdictional cases which hold that statutes creating an absolute bar to donor paternity violate due process rights as applied to a known donor: *McIntyre v. Crouch*, 98 Or. App. 462, 780 P.2d 239 (1989), *cert denied* 495 U.S.905 (1990). (Oregon statute's absolute bar to paternity violated due process as applied to known sperm donor if donor could establish on remand that he and child's mother agreed that donor would be the natural father of the child); and *C.O. v. W.S.*, 64 Ohio Misc. 2d 9, 639 N.E.2d 523 (1994) (Ohio statute's absolute bar to paternity of known donor violated due process as applied to donor where mother solicited participation of donor and

agreed that known donor would have relationship with child).

Significantly, the majority concurs with "the *McIntyre* and *C.O.* courts in their constitutional analyses of absolute bar statutes." Slip op. at 34. Nevertheless, the majority concludes it need not arrive at the same result because "K.S.A. 38-1114(f) provides exactly the sort of escape clause the Oregon and Ohio courts found lacking–and unconstitutional–in their statutes." Slip op. at 34.

I agree with the majority's conclusion that "absolute bar" statutes like those at issue in *McIntyre* and *C.O.* violate due process. I do not agree, however, that the K.S.A. 38-1114(f) provision permitting a donor to "opt out" of the statute's paternity bar saved the statute's constitutionality under the facts of this case.

The statutory provision at issue here bears repetition at this juncture. K.S.A. 38-1114(f) provides:

"The donor of semen provided to a licenced physician for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the birth father of a child thereby conceived, *unless agreed to in writing by the donor and the woman*." (Emphasis added.)

Before discussing the specific basis for my disagreement with the majority's conclusion that the italicized proviso renders the statute constitutional as applied to D.H., I would first note that neither the *McIntyre* court nor the *C.O.* court found, as the majority suggests, that their respective state statutes were unconstitutional because they lacked an "escape clause"

providing for a written agreement between the parties.

The court in *McIntyre* found the applicable statute problematic because it barred the petitioner from the rights and responsibilities of fatherhood "even if respondent had agreed with [the donor that he would have parental rights] before he gave her his semen in reliance on that agreement." 98 Or. App. at 468. The court noted the statute contained no qualifying language and, in a footnote, compared a Washington state statute which contained a written opt-out provision similar to that found in K.S.A. 38-1114(f). 98 Or. App. at 468 n.2; see also *In Interest of R.C.*, 775 P.2d 27, 33 n.7 (Colo. 1989) (recognizing in footnote that "[a] growing number of legislatures have sought to clear up this confusion by enacting laws that extinguish parental rights of semen donors unless the donor acknowledges his paternity in writing"). The court in *McIntryre*, however, did not determine whether the addition of an opt-out provision like that at issue here would have resolved its due process concerns.

Moreover, while the court in *C.O.* did point out that a statute that "absolutely extinguishes a father's efforts to assert the rights and responsibilities of being a father . . . runs contrary to due process standards," it did not compare any statutes containing a written opt-out provision. Further, it found its own statute lacking because it did not take into account the parties' *oral* agreement that the donor would have a relationship with any child conceived of the insemination. 64 Ohio Misc. 2d at 12. The court in *C.O.* did not, as the majority suggests, indicate that a written opt-

out agreement would have ameliorated the court's due process concerns.

In fact, the expansive rationale in *C.O.* suggests otherwise:

"Public policy supports the concept of legitimacy, and the concomitant rights of a child to support and inheritance. [Citation omitted.] A father's voluntary assumption of fiscal responsibility for his child should be endorsed as a socially responsible action." 64 Ohio Misc. 2d at 12.

Thus, while the courts in *C.O.* and *McIntyre* suggested that it was their respective statute's "absolute bar" that ran afoul of due process safeguards, neither court held that a requirement permitting the parties to opt out of the statute, so long as the agreement was memorialized *in writing*, would satisfy due process safeguards. As the majority recognizes, no court has considered the specific issue facing this court.

For the reasons discussed below, I would find that K.S.A. 38-1114(f)'s inclusion of a written "opt-out" provision does not save it from the same fate as the statutes considered by the courts in *McIntyre* and *C.O.*–*i.e.*, it is unconstitutional because it violates due process as applied to the donor.

Requirement that donor take affirmative action to protect his parental rights

In concluding that the opt-out provision in K.S.A. 38-1114(f) satisfies due process requirements, the majority states that D.H.'s "own *inaction* before donating his sperm" left him unable to meet the

statute's requirements of a written agreement. Slip op. at 38. (Emphasis added.) Therein lies the constitutional problem with the statute. Fundamental rights must be actively waived, rather than passively lost due to inaction.

Initially, before analyzing this issue, I would note that the terminology employed by the majority, *i.e.*, that D.H. failed to "opt out" of the statute, is a misnomer. In effect, the statute requires a known sperm donor, regardless of any agreement or understanding the donor may have as to his role in parenting a child conceived from his sperm, to *opt in* to parenthood or forever waive his right to parent. As discussed below, under the circumstances of this case, the statute's requirement that D.H. take affirmative action to preserve his fundamental right to parent, or to "opt in" to parenting, violates fundamental principles of due process.

Pursuant to the Fourteenth Amendment to the United States Constitution, no State shall "deprive any person of life, liberty, or property, without the due process of law." The Supreme Court has held that the Fourteenth Amendment "guarantees more than fair process" and "includes a substantive component that 'provides heightened protection against government interference with certain fundamental rights and liberty interests. '[Citation omitted.]" *Troxel v. Granville*, 530 U.S. 57, 65, 147 L. Ed. 2d 49, 120 S. Ct. 2054 (2000). It is well established that the right to parent is a fundamental right protected by the United States Constitution. See, *e.g.*, *Troxel*, 530 U.S. at 65-66; *Stanley v. Illinois*, 405 U.S. 645, 651-52, 31 L. Ed. 2d 551, 92 S. Ct. 1208 (1972).

The Supreme Court has further consistently held that courts must "indulge every reasonable presumption against waiver of fundamental constitutional rights." *Johnson v. Zerbst*, 304 U.S. 458, 464, 82 L. Ed. 1461, 58 S. Ct. 1019 (1938). "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege" and thus must result from a free and conscious choice. 304 U.S. at 464. And, when faced with a waiver of a fundamental right, courts "do not presume acquiescence in the loss of fundamental rights." 304 U.S. at 464; see also *Hodges v. Easton*, 106 U.S. (16 Otto) 408, 412, 27 L. Ed. 169, 1 S. Ct. 307 (1882) (right to trial by jury in a civil case is a fundamental right and every reasonable presumption must be indulged against its waiver).

The majority recognizes that K.S.A. 38-1114(f) permits a donor to waive his right to parent simply by his own inaction rather than through an intentional act relinquishing that right. For this reason, I would find the statute's "escape clause" does not satisfy due process requirements.

Effect of "ignorance of the law" on an individual's fundamental right to parent

Nor can I agree with the majority's conclusion that D.H.'s ignorance of the statute's writing requirement has no effect on the statute's application. Slip op. at 38. In support of this determination, the majority essentially reiterates the often-stated principle that "ignorance of the law is no excuse," and cites three cases in support of its application of this principle to the facts here: *Lehr v. Robertson*, 463 U.S. 248, 264,

77 L. Ed. 2d 614, 103 S. Ct. 2985 (1983); *Jhordan C. v. Mary K.*, 179 Cal. App. 3d 386, 389, 224 Cal. Rptr. 530 (1986); and *State ex rel. Murray v. Palmgren*, 231 Kan. 524, 536, 646 P.2d 1091 (1982). However, none of these cases hold that an individual can relinquish a fundamental right simply through ignorance of the law.

As the majority notes, the Kansas Supreme Court held in *Murray*, 231 Kan. at 536, that "[i]gnorance of the law is no excuse." Further, the court referred to the "impressive body of authority and the ancient maxim" supporting this statement. 231 Kan. at 536. However, the question before the court in *Murray* was not whether an individual may waive a fundamental right by ignorance of a law requiring affirmative action to protect that right. Rather, the question in *Murray* was whether the meetings conducted by the board of trustees of a county hospital were covered by the Kansas Open Meetings Act, in light of the board members' claim that any violation of the Act was in "good faith" because they had been advised by the county attorney that their meetings were not covered by the Act. I simply cannot equate such "ignorance," and the effect of such ignorance, with a father's preconception waiver of his right to parent a child because of his ignorance of a statute requiring him to "opt in" to parenting.

Jhordan C., 179 Cal. App. 3d 386, also cited by the majority, is unpersuasive for the obvious reason that it is not precedential authority. More importantly, while the majority cites *Jhordan C.* in support of its statement that D.H.'s ignorance of our Kansas statute does not preclude its application here, the court in

Jhordan made no determination whatsoever as to whether a donor's ignorance of a California statute would suffice to waive his fundamental right to parent. Instead, the *Jhordan C.* court merely noted in reciting the factual background that the parties were "completely unaware of the existence" of the statute. 179 Cal. App. 3d at 389. Moreover, the court in *Jhordan C.* ultimately concluded California's statute could not bar the donor's rights because the donor's sperm had not been provided to a licensed physician. 179 Cal. App. 3d at 397-98.

The third case cited by the majority in support of its conclusion that the donor's "ignorance of the law is no excuse," is *Lehr*, 463 U.S. at 264. There, the United States Supreme Court considered whether a biological father should receive notice of adoption when that father never established a relationship with his child and further failed to comply with a New York law requiring him to file notice with a putative father registry. The Court recognized that familial relationships are "an interest in liberty entitled to constitutional protection" and state statutes that take away this right must comport with the Due Process Clause of the Fourteenth Amendment to the United States Constitution. 463 U.S. at 258.

As the majority points out, the *Lehr* Court held that the putative father's ignorance of the requirement that he must mail a postcard to the putative father registry to guarantee his right to receive notice of the adoption proceedings of his daughter, was not a "sufficient reason to criticize the law itself." 463 U.S. at 264.

However, the majority's focus on this aspect of the *Lehr* decision is misplaced in light of *Lehr's* recognition and characterization of a father's fundamental rights to parent.

The *Lehr* Court noted it was not concerned with whether the father had a significant relationship with his biological daughter but, instead, was focused on whether New York *protected his opportunity as a father to form that relationship*. 463 U.S. at 262. The Court examined New York's putative father registry and found that because the biological father retained the control to receive notice of adoption proceedings, the Due Process Clause was not violated. 463 U.S. at 264.

In so ruling, the Court noted that the impetus for New York's putative father registry was the holding in *Stanley v. Illinois*, 405 U.S. 645, where the Supreme Court struck down a statute that automatically classified any man who fathered a child out of wedlock as an unfit parent. The Court in *Lehr* further noted that a special committee charged by the New York Legislature with forming the law after *Stanley* was supposed to "accommodate both the interests of the biological fathers in their children and the children's interests in prompt and certain adoption procedures." 463 U.S. at 263.

Thus, when considering *Lehr* and its application here, it is vital to remember the Court upheld a statute that terminated the parental rights of a biological father, but it did so in the context of a pending adoption proceeding. Because a nonbiological father figure was ready, willing, and able to assume

the responsibilities of parenthood, the *Lehr* Court found no reason to delay the child's adoption simply because the previously absentee biological father suddenly asserted rights, yet failed to take the steps necessary--as provided by a statute--to preserve those rights. 463 U.S. at 265-66.

Placed in context, the *Lehr* Court's affirmance of the termination of the biological father's parental rights makes sense, and the Court's observation that "'[p]arental rights do not spring full-blown from the biological connection between parent and child'" is merited. 463 U.S. at 260 (quoting *Caban v. Mohammed*, 441 U.S. 380, 397, 60 L. Ed. 2d 297, 99 S. Ct. 1760 [1979] [Stewart, J., dissenting] [ruling that the adoption of two children by their stepfather would violate the Equal Protection rights of the biological father, who had constantly been involved with the lives of the children]).

Here, however, we are not faced with a situation in which an additional party seeks to assert parental rights; instead, only the biological father seeks to assert his rights to parent his children. Thus, the need for a determination of parental rights does not exist in the same urgency that it exists in an adoption situation where all parties involved, particularly the child, are best served with clear laws and a certain ruling.

I would urge the majority to consider the *complete* rationale of *Lehr*: "When an unwed father demonstrates a full commitment to the responsibilities of parenthood by 'com[ing] forward to participate in the rearing of his child,' his interest in personal contact with his child acquires substantial protection under

the Due Process Clause." 463 U.S. at 261 (quoting *Caban*, 441 U.S. at 392).

That is the scenario with which this court is faced. A putative father has come forward to participate in the rearing of his children, emotionally and financially; consequently, his interest in doing so is entitled to full protection under the Due Process Clause. Instead of being given this protection and an opportunity to prove that he intended to actively parent his children, D.H. has been subjected to the workings of a statute of which he was unaware, that required him to "opt in" to fatherhood before ever donating his sperm, or be forever barred from parenting his children.

I strongly disagree with the majority's conclusion that D.H.'s own inaction, whether due to ignorance of the law or otherwise, constituted a waiver of his rights to parent. Because the rights to parent are fundamental, those rights may be waived only through an intentional, free, and meaningful choice. Here, the record indicates D.H. was not even aware of K.S.A. 38-1114(f), much less its requirement that he must enter into a written agreement formalizing his intent to parent his child before he provided his sperm to S.H. I would find the statute's requirement that a known sperm donor affirmatively take action to preserve his fundamental rights to parent constituted a violation of due process as applied to D.H.

The State's interest in furthering predictability, clarity, and enforceability

The majority declares that the K.S.A. 38-1114(f) requirement that any agreement regarding parenting

be in writing "enhances predictability, clarity, and enforceability." Slip op. at 37. Further, it suggests that "avoidance of the limbo in which D.H. finds himself in is a worthy legislative goal." Slip op. at 37.

"Clarity," while an admirable goal, has little do with the constitutionality of this statute. Significantly, in *Stanley*, 405 U.S. 645, the United States Supreme Court addressed the allegations of clarity and administrative convenience as justifications for a purported violation of the Due Process Clause. There, an unwed father challenged an Illinois statute which resulted in his classification as an unfit father and the removal of his children from their home after the death of the mother because he had not been married to the children's mother. The State argued it was unnecessary to hold individualized hearings to determine the fitness of unwed fathers before those fathers were separated from their children because unmarried fathers were "per se" unfit.

The Supreme Court disagreed and ruled in accordance with the Due Process Clause that Stanley was entitled to a fitness hearing before his children were taken from him. 405 U.S. at 649. The Court specifically addressed the argument that individualized hearings for unmarried fathers would create an administrative inconvenience and noted that although the State has an interest in prompt procedures, "the Constitution recognizes higher values than speed and efficiency." 405 U.S. at 656.

Thus, even though K.S.A. 38-1114(f) may provide a quick and clear method to dismiss paternity actions, it must comport with the values inherent in the Constitution, namely due process of law.

The Court in *Stanley* pointed out that prompt procedures are not the only consideration important to citizens:

"Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand." 405 U.S. at 656-57.

Kansas law provides a presumption that sperm donors are not the legal parents of any children conceived of the donated sperm, absent a written agreement. In the case of a known sperm donor and an unmarried woman, however, the donor should be allowed the opportunity for a hearing to establish his intent to be something other than a sperm "donor"–*i.e.*, to establish his paternity and rights as a parent. Simply stated, I would find the statute's clarity does not justify its constitutional violation.

The requirement of a "writing" under K.S.A. 38-1114(f)

It is interesting to note that in considering whether the K.S.A. 38-1114(f) writing requirement may be met by considering S.H.'s averments in her pleadings, the majority references Lewis Carroll's "looking glass." Slip op. at 47. ("[I]nterpreting [pleadings] separately or together to prove the parties 'agreed' to D.H.'s status as a father would require Lewis Carroll's looking glass."). While I agree with the majority that we cannot interpret the pleadings filed by S.H. (in

which she referred to D.H. as the "father" of her children at least 56 times) as the "writing" contemplated by K.S.A. 38-1114(f), I would find that S.H.'s inconsistent pleadings and actions are evidence to be considered by the district court in determining whether the parties agreed that D.H. would play an active role in the twins' life.

S.H. filed a child in need of care (CINC) petition the day following the twins' birth seeking to terminate D.H.'s parental rights. In the petition, she alleged several reasons for terminating D.H.'s parental rights, including D.H.'s failure to provide prenatal emotional and financial support, which implied she intended D.H. to play a role in the parenting process. Significantly, no mention was made in the CINC petition of K.S.A. 38-1114(f) or its potential application here. In fact, it was not until petitioner filed an amended petition more than 2 weeks after the initial petition that mention was made of K.S.A. 38-1114(f) and its presumption of nonpaternity.

Thus, I would remand for the district court to consider all evidence relevant to the existence of an agreement between the parties, including S.H.'s inconsistent allegations regarding D.H.'s responsibilities, her consistent reference to D.H. as the "father" of her children, and her failure to rely upon the statutory presumption in her initial petition.

As a final note, I agree that this court should not place fathers in an "Alice and Wonderland" scenario where the rules of the "chess game" are constantly changing and Kansas children are sometimes left without two supportive parents. And yet, it seems to

me that rather than Lewis Carroll's looking glass, we are looking at this case through a "funny mirror" at the local carnival. It is apparent that D.H. seeks to be a loving and supportive parent to the two children he has biologically fathered–two children who have no other putative father. And yet, by operation of a statute of which D.H. was unaware, his rights to parent these children were cut off before the children were conceived with the use of his sperm. This is a result we should not abide for D.H. or for his children absent the protections of due process.

Conclusion

I would hold K.S.A. 38-1114(f) unconstitutional as applied to D.H. as it takes away his fundamental rights to parent his children without due process of law. Further, I would remand this case with directions to the district court to resolve the factual dispute recognized by the majority here–*i.e.*, whether D.H. and S.H. agreed that D.H. would be the natural father of K.C.H. and K.M.H. If the court concludes that such an agreement existed, then it must hold that K.S.A. 38-1114(f) did not apply to extinguish D.H.'s rights and must proceed to determine paternity and the extent to which D.H. will be permitted to share the rights and responsibilities of parenting his two children.

HILL, J., dissenting: I must respectfully join with Judge Caplinger in her dissent. I too agree that as applied in this case, K.S.A. 38-1114(f) is unconstitutional when applied to a known donor.

But I raise my hand and ask a different question. Who speaks for the children in these proceedings? As applied by the majority in this case, this generative statute of frauds slices away half of their heritage. A man who was once considered a "putative father" in the initial child in need of care proceeding is now branded a mere "semen donor." The majority offers the children sympathy. But is this in their best interests? The trial court never got to the point of deciding the best interests of the children because it was convinced that such a consideration was barred by the operation of K.S.A. 38-1114(f) to a known donor.

None of the elaborate and meticulous safeguards our Kansas laws afford parents *and children* in proceedings before our courts when confronted with questions of parentage have been extended to these children. A quick glance over our procedures dealing with the Kansas Parentage Act (K.S.A. 38-1110 *et seq.*) or our Code for Care of Children (K.S.A. 38-1501 *et seq.*) reveals the great caution we take in this state when courts must consider such relationships. While it is true that an attorney was appointed to represent the children in the original child in need of care case, the record from their point of view remains silent. Instead only the voices of mother and "semen donor" are heard in district court and this court as well.

I agree with the Ohio Court of Common Pleas when it said:

"A father's voluntary assumption of fiscal responsibility for his child should be endorsed as a socially responsible action. A statute which absolutely extin-

guishes a father's efforts to assert the rights and responsibility of being a father, in a case with such facts as those *sub judice,* runs contrary to due process safeguards. [Citation omitted.]" *C.O. v. W.S.*, 64 Ohio Misc. 2d 9, 12, 639 N.E.2d 523 (1994) (citing *Lehr v. Robertson*, 463 U.S. 248, 77 L. Ed. 2d 614, 103 S. Ct. 2985 [1983]).

I think the same can be said about our statute.

IN THE SUPREME COURT
OF THE STATE OF KANSAS

No. 96,102

IN THE INTEREST OF K.M.H., A CHILD UNDER AGE EIGHTEEN, AND K.C.H., A CHILD UNDER EIGHTEEN, IN THE MATTER OF PATERNITY OF K.C.H. AND K.M.H BY AND THROUGH THEIR NEXT FRIEND, D.H.,
Appellant,
v.

S.H.,
Appellee.

ORDER

The Motion to Transfer ease No, 96,102 to this Court pursuant to K.S.A. 20-3017 and Supreme Court Rule 8.02 (2005 Kan. Ct. R. Annot. 60) and the response to the Motion to Transfer are noted. The above captioned case is hereby transferred to the Supreme Court pursuant to K.S.A. 20-3018(c).

BY ORDER OF THE COURT, this 10th day of October 2006.

/s/ KAY McFARLAND
Chief Justice

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS

In The Interest of KAITLYN M. HARRINGTON, A Child Under Aqe Eiqhteen	)))	CASE NO. 05JC372
In The Interest of KADEN C. HARRINGTON, A Child Under Aqe Eiqhteen	)))	CASE NO. 05JC373
IN THE MATTER OF THE PATERNITY OF: Kaitlyn M. Harrington and Kaden C. Harrington By and through, Daryl D. Hendrix	)))	CASE NO. 05D1223
Vs. Samantha R. Narrinqton	))	

MEMORANDUM

Samantha Harrington has filed a Motion seeking dismissal of any claims of Daryl D. Hendrix that he has any parenting rights recognized by Kansas law regarding the minor children Kaitlyn M. Harrington and Kaden C. Harrington.

The Court has reviewed the pleadings and would accept the stipulation offered in a telephone conference held approximately December 20, 2005, that the children were conceived as the result of a medical procedure conducted by a physician in Kansas City, Missouri.

The Court would note that the briefs are of exceptional quality and were quite helpful to the Court.

The underlying facts are not in substantial dispute.

PRELIMINARY FACTUAL FINDINGS

1. Samantha R. Harrington (hereinafter Harrington) is an. unmarried adult who desired to become a parent through an artificial insemination procedure.
2. Harrington desired to be impregnated with sperm of a known donor.
3. Harrington was a friend of Daryl D, Hendrix (hereinafter Hendrix) and approached him about being a sperm donor.
4. Hendrix agreed to provide the genetic material necessary for an artificial insemination procedure.
5. Both Harrington and Hendrix were Kansas residents, The original conversations and agreement that Hendrix would be a sperm donor occurred in Kansas.
6. Harrington and Hendrix now disagree as to whether Hendrix was to have any parental role beyond the donation of genetic material.
7. Harrington underwent two artificial insemination procedures in Missouri. On the first procedure, Hendrix,,accompanied Harrington to Missouri and provided the genetic material to medical personnel. The first procedure did not result in a pregnancy.

8. Hendrix did not go to Missouri for the second procedure. He placed his genetic material into a plastic container and gave it to Harrington. Harrington then took the container to the .fertility clinic in Missouri and underwent a second artificial insemination procedure.

9. As a result of the second procedure, Harrington became pregnant and gave birth to the minor childrenwho are the subject matter of this litigation.

Additional factual findings will be made as necessary to rule on the pending Motion.

CONFLICT OF LAW

HarringtOn requests the Court apply Kansas substantive law. Hendrix requests the Court apply Missouri law. Kansas has a statute regarding artificial insemination that strongly favors Harringtan. Missouri has no similar statute.

The only Missouri connection to the dispute is the physical act of a medical procedure.

Factors favoring the application of Kansas law include the residence of both parties at all relevant times, the children are residents of Kansas (and were apparently born in Kansas), the discussions and agreement leading to the furnishing of genetic material occurred in Kansas and the second donation of genetic material and the delivery by Hendrix of the same occurred in Kansas.

Choice of law questions involve resolution based on fundamental fairness applied to the dispute at hand. The parties did not "negotiate" for the application of any particular jurisdiction's law in forming their agreement. Therefore, the Court must resoive the choice of law issue,

The Kansas connection is substantial. Hendrix has made no allegations of inconvenience or unfairness to the application of Kansas law from a procedural context.

The Court places some significance to the fact that Hendrix did not physically go to Missouri to provide genetic material, for the second procedure.His claim that Missouri law should be applied is weakened by the fact that on the procedure that resulted in the pregnancy Nendrix's involvement was physically completed in Kansas.

The nexus of this dispute to Kansas is significant. Since there are no compelling fairness arguments to weigh, Kansas' substantive !aw will be applied.

CONSTITUTIONALITY OF K.S.A. 38-1114(f)

Hendrix challenges the constitutionality of the Kansas artificial insemination statute K.S.A. 38-114(f).

Law will always trail science and society. Historically, both law and society could harshly treat an individual on the basis of matters beyond individual control, Illegitimacy was shameful. Certain vocations, educational institutions and careers were closed to those who did not have married parents. Polite society

would have at a minimum discouraged, and more likely banned social contact with persons marked by the stigma of illegitimacy.

Laws developed supporting the public policy of legitimacy, support and claim to inheritance. Science developed to prove paternaL involvement beyond a marriage license or a court resolution of "He said - she said."

As science has further developed, pregnancy is not solely caused by traditional sexual intercourse and may involve genetic material from persons who have never met or even from persons who are deceased.

Future courts will resolve matters regarding cloning and other scientific advances that as of yet we cannot even imagine.

This case is a matter of first impression in Kansas. Counsel for Hendrix has cited authorities form Ohio and California and a United States Supreme Court decision which are interesting but not controlling.

In reviewing a statute, the court presumes constitutionality and must find a statute to be constitutiona! if it can reasonab!y do so within the apparent intent of the legislature in passing The statute. State v. Durrant, 244 Kan 522, 769 P.2d 1176, cert. denied 492 U.S. 923 (1989).

The Court declines the invitation to find K.SoA. 38-1114(f) unconstitutional. The public policy advanced appears to make good sense of advancing reproductive options and avoiding litigation while affording a method of protecting a donor's interests if he so desires. The public policy embodied in the

statute does not appear to violate any Kansas or United States constitutional fights.

DOES K.S.A.38-1114(f)APPLY?

Hendrix contends that KoS.A. 38-1114(0 does not apply because he provided the genetic material to Harfington rather than to a licensed physician.

The factual contention that the genetic material was taken to the clinic by Harrington is apparently not contested. The question is whether the use of an interested courier is significant.

Statutes can never anticipate every possible factual scenario. As noted earlier, Courts are to honor the apparent intent of the legislature when we can do so.

The plain language of K.S.A. 38-1114(f) anticipates a medical procedure by a licensed physician would be the ordinary course for artificial insemination. The legislature chose not to get into the details of medical support staff, courier services or other variables that a given case might involve.

A procedure in a medical clinic was conducted and two children were conceived. This procedure was as anticipated by the parties. Is there an appropriate distinction to draw between deiivery of genetic material to an interested courier as compared to delivery of genetic material to medical personnel?

Since the medical procedure which resulted in the conception of the children was as contemplated by Harrington and Hendrix, the court fails to see how Hendrix can now complain that his interests are

effected by the fact he delivered genetic material to Harrington for delivery to medical personnel as compared to his personal detivery of the genetic material to medical personnel.

The court finds that K.S. A, 38-1114(f) generally applies to this dispute.

DO THE ClNC FILINGS CONSTITUTE A WRITTEN AGREEMENT'?

Hendrix contends the child in need of care proceedings initiated by Harrington which acknowledge he is the "father" satisfies the "agreed to in writing" language of K.S.A. 38-1114(f).

Counsel for Hendrix skillfully asks the court to review other statutes and general rules of construction to conclude the "agreed to in writing" requirement has been satisfied.

Certainly there could be scenarios where letters, memorandum, e-mails or other indicia of understanding should be interpreted together to see if a contract has been formed.

However, the intent of Harrington in her ClNC filings is so clear and is in such conflict with the position claimed by Hendrix that the court can simply not accept that the ClNC pleadings satisN the writing requirement.

CONCLUSION

This matter could have, and perhaps should have, been better handled from the beginning. The delay,

expense, emotional turmoil and uncertainty caused by this dispute was completely avoidable if the "agreement" was documented.

The Court would find that K.S.A. 38-1 114(f) is constitutional and applies to this dispute. Since there is no written agreement.that Hendrix as a sperm donor would be treated as a "birth father", the Court finds he has no legal rights or responsibilities concerning Kaitlyn Harrington and Kaden Harrington.

The authorities and arguments advanced by Attorney Andrews are adopted by the Court to the extent they are consistent with this opinion.

The Motion to Dismiss is sustained. Cases 05-JC-372 and 05-JC-373 are dismissed as moot. In case 05-D-1223, Daryl D. Hendix is found not to be the legal father of Kaitlyn M. Harrington and Kaden C. Harrington.

Attorney Andrews is requested to prepare appropriate journal Entries.

Date: December 27, 2005

/s/ ROBERT J. SCHMISSEUR
DISTRICT JUDGE

XC: Susan Barker Andrews
Kurt L. James
Kevin J. Cook

K.S.A. § 38-1114

KANSAS STATUTES
CHAPTER 38.--MINORS
ARTICLE 11.--DETERMINATION OF PARENTAGE
PARENTAGE ACT

38-1114. Presumption of paternity.

(a) A man is presumed to be the father of a child if:

(1) The man and the child's mother are, or have been, married to each other and the child is born during the marriage or within 300 days after the marriage is terminated by death or by the filing of a journal entry of a decree of annulment or divorce.

(2) Before the child's birth, the man and the child's mother have attempted to marry each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is void or voidable and:

(A) If the attempted marriage is voidable, the child is born during the attempted marriage or within 300 days after its termination by death or by the filing of a journal entry of a decree of annulment or divorce; or

(B) if the attempted marriage is void, the child is born within 300 days after the termination of cohabitation.

(3) After the child's birth, the man and the child's mother have married, or attempted to marry, each other by a marriage solemnized in apparent compli-

ance with law, although the attempted marriage is void or voidable and:

(A) The man has acknowledged paternity of the child in writing;

(B) with the man's consent, the man is named as the child's father on the child's birth certificate; or

(C) the man is obligated to support the child under a written voluntary promise or by a court order.

(4) The man notoriously or in writing recognizes paternity of the child, including but not limited to a voluntary acknowledgment made in accordance with K.S.A. 38-1130 or 65-2409a, and amendments thereto.

(5) Genetic test results indicate a probability of 97% or greater that the man is the father of the child.

(6) The man has a duty to support the child under an order of support regardless of whether the man has ever been married to the child's mother.

(b) A presumption under this section may be rebutted only by clear and convincing evidence, by a court decree establishing paternity of the child by another man or as provided in subsection (c). If a presumption is rebutted, the party alleging the existence of a father and child relationship shall have the burden of going forward with the evidence.

(c) If two or more presumptions under this section arise which conflict with each other, the presumption

which on the facts is founded on the weightier considerations of policy and logic, including the best interests of the child, shall control.

(d) Full faith and credit shall be given to a determination of paternity made by any other state or jurisdiction, whether the determination is established by judicial or administrative process or by voluntary acknowledgment. As used in this section, "full faith and credit" means that the determination of paternity shall have the same conclusive effect and obligatory force in this state as it has in the state or jurisdiction where made.

(e) If a presumption arises under this section, the presumption shall be sufficient basis for entry of an order requiring the man to support the child without further paternity proceedings.

(f) The donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the birth father of a child thereby conceived, unless agreed to in writing by the donor and the woman.

STATE STATUTES EXPLICITLY OR IMPLICITLY ADDRESSING USE OF ARTIFICIAL INSEMINATION BY UNMARRIED WOMEN

ALA. CODE § 26-17-21: (b) The donor of semen provided to a licensed physician for use in artificial insemination of a married woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived.[1]

A.R.S. § 25-501(B): A child who is born as the result of artificial insemination is entitled to support from the mother as prescribed by this section and the mother's spouse if the spouse either is the biological father of the child or agreed in writing to the insemination before or after the insemination occurred.[2]

CAL. FAM. CODE § 7613: (b) The donor of semen provided to a licensed physician and surgeon for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived.[3]

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[1] This Alabama statute is part of Title 26. Infants and Incompetents. Chapter 17 is the Alabama Uniform Parentage Act and Section 21 is titled, "Artificial Insemination."

[2] This Arizona statute is part of Title 25. Marital & Domestic Relations. It is part of Chapter 5 titled, "Family Support Duties," and Article 1 titled, "General Provisions." Section 501 is titled, "Duties of support; exemptions."

[3] The statute is part of the California Family Code. It is a part of Division 12 (Parent and Child Relationship), Part 3 (Uniform Parentage Act), Chapter 2 (Establishing the Parent – Child

(continued...)

COLO. REV. STAT. ANN. § 19-4-106(2): A donor is not a parent of a child conceived by means of assisted reproduction, except as provided in subsection (3) of this section.[4]

CONN. GEN. STAT. § 45a-775: A donor of sperm used in A.I.D., or any person claiming by or through him, shall not have any right of interest in any child born as a result of A.I.D.[5]

DEL. CODE. ANN. TIT. 13 § 8-702: A donor is not a parent of a child conceived by means of assisted reproduction. § 8 – 704: (a) Consent by a woman and a man who intends to be a parent of a child born to the woman by assisted reproduction must be in a record signed by the woman and the man. This requirement does not apply to the donor. (b) Failure to sign a consent required by subsection (a) of this section, before or after birth of the child, does not preclude a finding of paternity if the woman and man, during the first 2 years of the child's life, resided

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(...continued)
Relationship, and section 7613 (Natural father of child conceived by artificial insemination; conditions).

[4] This is part of Colorado's Uniform Parentage Act. Subsection (3) provides that, "If a husband provides sperm for, or consents to, assisted reproduction by his wife as provided in subsection (1) of this section, he is the father of the resulting child.

[5] Section 45A is in the Probate Courts and Procedure section of the Connecticut Statutes. Chapter 830A deals with Children Conceived through Artificial Insemination.

together in the same household with the child and openly held out the child as their own.[6]

F.S.A. § 742.14: The donor of any egg, sperm, or preembryo, other than the commissioning couple or a father who has executed a preplanned adoption agreement under s. 63.212, shall relinquish all maternal or paternal rights and obligations with respect to the donation of the resulting children.[7]

IDAHO CODE ANN. § 39-5405: (1) The donor shall have no right, obligation or interest with respect to a child born as a result of artificial insemination. (2) A child born as a result of the artificial insemination shall have no right, obligation, or interest with respect to such donor.[8]

§ 750 I.L.C.S. 40/3(b): The donor of semen provided to a licensed physician for use in artificial insemination other than the donor's wife shall be treated in law as

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[6] Chapter 8 is Delaware's Uniform Parentage Act. Subchapter VII is titled "Child of Assisted Reproduction." Section 702 is titled, "Parental status of donor," and section 704 is titled, "Consent to assisted reproduction."

[7] F.S.A. § 742.14. This statute is titled "Donation of eggs, sperm, or preembryos." It is found in Title XLIII. Domestic Relations, Chapter 742 Determination of Parentage.

[8] Idaho Code Ann § 39-5405. This statute is entitled, "Rights of donor, child, husband." It is in Title 39 Health and Safety, Chapter 54. Artificial Insemination.

if he were not the natural father of the child thereby conceived.[9]

(f) The donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the birth father of a child thereby conceived, unless agreed to in writing by the donor and the woman."[10]

M.S.A. § 257.56. Donor not treated as biological father. The donor of semen provided to a licensed physician for use in artificial insemination of a married woman other than the donor's wife is treated in law as if he were not the biological father of a child thereby conceived.[11]

MO. ANN. STAT.) 210.824(2): The donor of semen provided to a licensed physician for use in artificial insemination of a married woman other than the donor's wife is treated in law as if he were not the

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[9] This Illinois statute is in Chapter 750. Families. Act 40 is the Illinois Parentage Act and section 3 it titled, "Husband of Husband of artificially inseminated wife; treatment as natural father."

[10] Chapter 38 of the Kansas Code is titled, "Minors." Article 11 is titled, "Determination of Parentage" and Section 1114 is titled, "Presumptions of Paternity."

[11] This Minnesota statute is part of "Public Welfare and Related Activities." It is part of Chapter 257 on "Children, Custody, Legitimacy" of which section 256 concerns "Artificial Insemination."

natural father of a child thereby conceived.[12]

MONT. CODE ANN.) 40-6-106: (2) The donor of semen provided to a licensed physician for use in artificial insemination of a married woman other than the donor's wife is treated in law as if the donor is not the natural father of a child conceived by artificial insemination.[13]

N.H. REV. STAT. ANN. § 168-B:3(2): Notwithstanding any other provision of law, a man is presumed to be the father of a child if:. (e) As an unmarried donor of sperm for use in artificial insemination or in vitro fertilization, he and an unmarried woman, who under RSA 168-B:2 would be the mother of the child, follow the procedures in RSA 168-B:10-12 or 168-B:13-15 and agree in writing in advance of the procedure that the donor shall be the father. 168-B:11 Liability of Sperm Donor for Support. A sperm donor may be liable for support only if he signs an agreement with the other parties to that effect. [14]

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[12] This Missouri statute is part of Title XII. Public Health and Welfare. Chapter 210 is "Child Protection and Reformation" and is part of the Uniform Parentage Act. Section 824 is titled, "Artificial insemination, consent required, duties of physician, effect of physician's failure to comply with law--inspection of records permitted, when."

[13] This Montana statute is part of Title 40. Family Law. Chapter 6 it titled, "Parent and Child" and Part 1 is titled, "Uniform Parentage Act." Section 106 is titled, "Artificial Insemination."

[14] This New Hampshire statute is in Title XII. Public Safety

(continued...)

N.D. CENT. CODE § 14-20-60: A donor is not a parent of a child conceived by assisted reproduction.[15]

N.J. STAT. ANN. § 9:17-44(b): Unless the donor of semen and the woman have entered into a written contract to the contrary, the donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the father of a child thereby conceived and shall have no rights or duties stemming from the conception of a child.[16]

N.M. STAT. ANN. § 40-11-6(B): Any donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor's wife may be treated as if he were the natural father of the

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(...continued)
and Welfare. Chapter 168-B is titled, "Surrogacy: Rules of Parentage," and Section 3 is titled, "Father-Child Relationship."

[15] Title 14 of the North Dakota code concerns "Domestic Relations and Persons." Chapters 14-20 are the states Uniform Parentage Act. Section 702 concerns the "Parental Status of Donor."

[16] This New Jersey statute is found in Title 9: Children – Juvenile and Domestic Relations Court. Chapter 17 is titled, "Bastardly Proceedings," Article 10 is titled, "Parentage," and section 44 is titled, "Artificial Insemination."

child thereby conceived if he so consents in writing signed by him and the woman.[17]

OHIO REV. CODE ANN. § 3111.95(B): If a woman is the subject of a non-spousal artificial insemination, the donor shall not be treated in law or regarded as the natural father of a child conceived as a result of artificial insemination, and a child so conceived shall not be treated in law or regarded as the natural child of the donor. No action or proceeding under sections 3111.01 to 3111.18 or section 3111.38 to 3111.54 of the Revised Code shall affect these consequences.[18]

10 OKL. ST. ANN. § 555: An oocyte donor shall have no right, obligation or interest with respect to a child born as a result of a heterologous oocyte donation from such donor. A child born as a result of a heterologous oocyte donation shall have no right, obligation or interest with respect to the person who donated the

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[17] Chapter 40 on the New Mexico Code is on Domestic Affairs, Article 11 is the Uniform Parentage Act of the state, and § 6 is titled, "Artificial Insemination."

[18] This Ohio statute is found under Title XXXI. Domestic Relations – Children. Chapter 3111 is titled, "Parentage." 3111.95(A) references use of AI with a married couple. The statute specifically excludes other Ohio statutes pertaining to parent-child relationships (e.g., paternity), thereby effectively barring any efforts to establish a parent-child relationship between the donor and the child. This also acts as a bar to any kind of argument based on children's rights.

oocyte which resulted in the birth of the child.[19]

OR. REV. STAT. § 109.239(1): If the donor of semen used in artificial insemination is not the mother's husband: (1) Such donor shall have no right, obligation or interest with respect to a child born as a result of artificial insemination; and (2) A child born as a result of artificial insemination shall have no right, obligation or interest with respect to such donor.[20]

TEX. FAM. CODE 160.702: A donor is not a parent of a child conceived by means of assisted reproduction.[21]

UTAH. CODE ANN. § 78-45g-702: A donor is not a parent of a child conceived by means of artificial insemination.[22]

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[19] This Oklahoma statute is a part of Title 10. Children. Chapter 24 is titled, "Artificial Insemination" and section 555 is titled, "Rights, obligations and interest of oocyte donor respecting child and child respecting donor."

[20] This statute is in Title 11. Domestic Relations. Chapter 109 is "Parent and Child Rights and Relationships." Section 239 is titled, "Rights of semen donors; rights of children born as a result of artificial insemination."

[21] This statute comes from the Texas Family Code. Title 5 is "The Parent-Child Relationship and the Suit Affecting the Parent-Child Relationship. Chapter 160 is the state's Uniform Parentage Act, Subchapter H is "Child of Assisted Reproduction." Section 702 concerns the "Parental Status of Donor."

[22] Title 78 is titled, "Judicial Code." Chapter 45g is the Utah Uniform Parentage Act. Part 7 is "Child of Assisted Reproduction" and section 702 is "Parental status of donor."

VA. CODE. ANN. § 20-158(a)(3): a donor is not the parent of a child conceived through assisted conception, unless the donor is the husband of the gestational mother.[23]

WASH. REV. CODE § 26.26.705: A donor is not a parent of a child conceived by means of assisted reproduction.[24]

WIS. STAT. § 891.40(2): The donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor's wife is not the natural father of a child conceived, bears no liability for the support of the child and has not parental rights with regard to the child.[25]

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[23] This statute is found in Title 20 – Domestic Relations. Chapter 9 is titled, "Children of Assisted Conception." Section 158 is titled, "Parentage of child resulting from assisted conception."

[24] This statute is found in Title 26, Domestic Relations. Chapter 26 is the state's Uniform Parentage Act and section 705 is titled, "Child of Assisted Reproduction – Parental Status of Donor. In 2002, Washington repealed former RCW 26.26.050(2) that stated that a donor who provided semen to a licensed physician for insemination of a woman other than his wife would not be considered the legal father of the child unless he and the woman had agreed in writing that he would be the father. See Stacey S. Bernstein, Washington's 2002 Parentage Act: A Step Backward for the Rights of Nonmarital Children, 30 Seattle U.L. Rev. 205 (2006).

[25] This statute is found in the "Testimony, Documentary Evidence and Presumptions" portion of the Wisconsin statutes. Chapter 891 it titled, "Presumptions." Section 40 is titled,

(continued...)

WYO. STAT. ANN. § 14-2-902: A donor is not a parent of a child conceived by means of assisted reproduction.[26]

STATES WITH ARTIFICIAL INSEMINATION STATUTES FOR MARRIED COUPLES BUT NOT UNMARRIED PARTIES (TEN STATES PLUS TWO BY CASE PRECEDENT).

ALASKA STAT. § 25.20.045; ARK. CODE ANN. § 9-10-201; GA. CODE ANN. § 19-7-21; LA. C.C. ART. 188; MD. CODE. ANN., EST. Y TRUSTS) 1-206; MASS. GEN. LAWS ANN. CH. 46, § 4B; MICH. COMP. LAWS ANN. § 333.2824; N.Y. DOM. REL. LAW § 73; N.C. GEN. STAT. § 49A-1; TENN. CODE ANN. § 68-3-306;

STATES WITH NO ARTIFICIAL INSEMINATION STATUTES FOR EITHER MARRIED OR UNMARRIED PARTIES (12 STATES)

HAWAII
IOWA
INDIANA
KENTUCKY
MAINE
MISSISSIPPI

(...continued)
"Artificial Insemination."

[26] This statute is found under Title 14 – Children. Chapter 2 is titled, "Parents" and Section 902 is titled, "Child of Assisted Reproduction."

NEBRASKA
NEVADA
PENNSYLVANIA
RHODE ISLAND
SOUTH CAROLINA
SOUTH DAKOTA
VERMONT
WEST VIRGINIA

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(4)

No. 07-1201

FILED

JUN 27 2008

OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

DARYL D. HENDRIX,

Petitioner,

v.

SAMANTHA HARRINGTON,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Kansas

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Under a Kansas statute addressing determination of parentage, when an unmarried woman undergoes an insemination procedure under the supervision of a licensed physician, the donor of the sperm is not treated as the legal father of any child thereby conceived unless the donor and the mother agree in writing that the donor will be regarded as the legal father. *See* Kan. Stat. Ann. § 38-1114(f) ("Donor Statute"). Here, the sperm donor and the mother did not enter into a written agreement so providing. The donor contends that the parties orally agreed that he would have parental rights, but the mother contends that there was no such oral agreement. This case presents the following issues:

Whether, as the Kansas Supreme Court ruled, application of the Donor Statute to determine that a sperm donor is not the legal father of children conceived through a medical insemination procedure does not violate the donor's rights under the Equal Protection Clause or the Due Process Clause of the Fourteenth Amendment under the circumstances of this case.

LIST OF PARTIES

The Petitioner is Daryl D. Hendrix, a resident of the State of Kansas, referred to as D.H. in the proceedings below.

The Respondent is Samantha Harrington, a resident of the State of Kansas, referred to as S.H. in the proceedings below.

K.M.H. and K.C.H. are S.H.'s children and are under the age of eighteen and residents of the State of Kansas. In this litigation, K.M.H. and K.C.H. have a guardian ad litem, Kevin J. Cook, appointed by the District Court of Shawnee County, Kansas.

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OPINIONS BELOW

The District Court of Shawnee County, Kansas, sustained S.H.'s motion to dismiss D.H.'s paternity action and found that D.H. has no legal rights or responsibilities concerning K.M.H. and K.C.H. App. 75. The District Court therefore dismissed as moot two "Child In Need of Care" petitions that S.H. had filed with respect to K.M.H. and K.C.H. *Id.* D.H. filed an appeal in the Kansas Court of Appeal. The Kansas Supreme Court transferred the appeal to itself. The Kansas Supreme Court treated S.H.'s motion to dismiss D.H.'s paternity action as a motion for summary judgment and affirmed the District Court on October 26, 2007. *Id.* at 12, 46. The opinion of the Kansas Supreme Court is reported as *In re K.M.H.*, 285 Kan. 53, 169 P.3d 1025 (Kan. 2007). On December 18, 2007, the Kansas Supreme Court denied a motion for rehearing that D.H. filed. *Id.* at 1.

JURISDICTION

The Kansas Supreme Court denied rehearing on December 18, 2007. The Petition for a Writ of Certiorari ("Petition") was filed on March 17, 2008, which was ninety days after the Kansas Supreme Court's order denying rehearing. *See* S. Ct. R. 13.1, 13.3. D.H. invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1257.

On April 7, 2008, S.H. waived her right to respond to the Petition. On April 28, 2008, the Court

requested a response. On May 12, 2008, an order was entered extending time to file a response to the Petition to and including June 27, 2008.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Amend. XIV, § 1.

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Kan. Stat. Ann. § 38-1114(f).

The donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the birth father of a child thereby conceived, unless agreed to in writing by the donor and the woman.

Kan. Stat. Ann. § 38-1115.

(a) A child or any person on behalf of such a child, may bring an action:

(1) At any time to determine the existence of a father and child relationship presumed under K.S.A. 38-1114 and amendments thereto; or

(2) at any time until three years after the child reaches the age of majority to determine the existence of a father and child relationship which is not presumed under K.S.A. 38-1114 and amendments thereto.

STATEMENT OF THE CASE

Respondent S.H. is a single woman who wished to be inseminated under the care of a physician using sperm of a known donor. She approached D.H., who was a friend, but with whom S.H. did not otherwise have a relationship, and requested that he donate sperm. D.H. agreed to do so. D.H. and S.H. were Kansas residents at all relevant times. S.H. is a lawyer; D.H. is not.

D.H. and S.H. did not enter into any written agreement regarding the sperm donation or providing for D.H. to be treated as a legal father of any child or children born as a result of the insemination procedure. D.H. and S.H. dispute whether they contemplated or orally agreed that D.H. would play any parenting role. S.H. contends there was no such agreement; D.H. contends there was.

S.H. underwent two medical insemination procedures in Missouri. For the first procedure, D.H. accompanied S.H. to Missouri and provided semen to medical personnel at a fertility clinic. The first procedure was not successful. For the second procedure,

D.H. placed his semen in a plastic container and gave it to S.H. for her to take to the fertility clinic in Missouri. S.H. underwent the second medical insemination procedure at the Missouri fertility clinic. The second procedure was successful, and S.H. gave birth to twins, a boy and a girl, on May 18, 2005. (The Petition's reference at page i to "twin daughters" is erroneous.)

A. Trial Court Proceedings

The day after the children's birth, S.H. filed a "Child in Need of Care" (CINC) petition in the District Court of Shawnee County, Kansas, seeking a determination that D.H. would have no parental rights with respect to the twins. On May 31, 2005, D.H. filed a separate paternity action claiming parental rights, including joint custody and visitation, and acknowledging financial responsibility for the twins. The District Court consolidated D.H.'s paternity action with S.H.'s CINC petition, in which a guardian ad litem had been appointed for the children.

S.H. filed a motion to dismiss the paternity action, invoking a Kansas statute that provides:

> the donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the birth father of a child thereby conceived, unless agreed to in writing by the donor and the woman.

Kan. Stat. Ann. § 38-1114(f) ("Donor Statute"). S.H.'s motion contended that, under the Donor Statute, D.H. was not a legal parent of the twins because there was no written agreement between D.H. and S.H. providing that he would have parental rights. S.H. also contended that the intent of the parties prior to insemination was clearly that S.H. would be a single parent and that D.H. would have no role beyond that of sperm donor. S.H.'s motion explained that S.H. sought out fertility tests and treatments on her own; that D.H. did not attend the second insemination procedure or prenatal sonograms or medical appointments; and that D.H. did not provide emotional support or financial assistance during the pregnancy or following the children's birth.

In addition to raising several state-law issues, D.H. contended that the Donor Statute, if applicable, would unconstitutionally deprive him of the right to care, custody, and control of the children. D.H.'s briefing referred to the Fourteenth Amendment and due process rights. D.H.'s trial court memorandum brief did not assert constitutional claims on behalf of the children, K.M.H. and K.C.H. His brief's only reference to the rights of children in general was contained in a description of an Ohio case. *See* Mem. Br. of D.H. 7 (Dist. Ct. Shawnee Cty., Nov. 15, 2005) ("D.H.'s Mem. Br.") (describing case as holding a statute "unconstitutional because public policy supports the concept of legitimacy and the concomitant rights of a child to support and inheritance").

The District Court held that the Donor Statute applied. Rejecting a contention by D.H., the District Court found that S.H.'s filing of a CINC petition and that petition's references to D.H. as a "father" did not satisfy the written agreement requirement of the Donor Statute. The District Court found instead that "the intent of [S.H.] in her CINC filings is so clear and is in such conflict with the position claimed by [D.H.]." App. 74.

The District Court also rejected D.H.'s constitutional arguments, holding, without specifying any particular constitutional provisions, that the Donor Statute does not violate any Kansas or federal constitutional rights. *Id.* at 71-73.

The District Court concluded that, under the Donor Statute, because there was no written agreement between the parties for D.H. to be deemed a birth father, D.H. "has no legal rights or responsibilities concerning" the children. *Id.* at 75. The District Court therefore granted S.H.'s motion to dismiss D.H.'s paternity action and dismissed S.H.'s CINC petition as moot. *Id.* at 75.

B. Kansas Supreme Court Proceedings

1. Majority and Concurring Opinions

D.H. appealed to the Kansas Court of Appeals, and the Kansas Supreme Court transferred the case to itself. App. 67.

The Kansas Supreme Court affirmed. In an opinion by Justice Beier, the court ruled that Kansas law applied. The Court interpreted the Donor Statute as applying to the circumstances of this case, rejecting D.H.'s contention that the statute was inapplicable because he provided his semen to S.H. to take to a fertility clinic rather than himself providing his semen to a licensed physician. *Id.* at 40-42.

The court also rejected D.H.'s contention that S.H.'s CINC petition, including its references to D.H. as "father," constituted, or even evidenced, a written agreement that D.H. would be regarded as a legal father of the children. *Id.* at 42-43. The court noted that S.H.'s CINC petition "may have been an odd procedural vehicle," but "she and her counsel were in uncharted waters." *Id.* at 43.

The court further held under Kansas law that D.H. had waived the argument, raised for the first time in his appellate reply brief, that S.H. had "unclean hands." *Id.* at 44-45. D.H.'s contention was that "he, as a nonlawyer, was tricked by lawyer S.H." *Id.* at 44. The court held that D.H. had failed to provide an adequate appellate record and had "never proffered evidence to support his assertion of nefarious conduct by S.H." *Id.* at 45. In rejecting D.H.'s equitable arguments, the court expressly held open the possibility that a donor could make an adequate equitable showing "in the future" but stated that "[t]his is not such a case." *Id.* at 45-46.

Regarding the constitutionality of the Donor Statute, the court noted that D.H.'s brief made only "a general allegation" that the Donor Statute is unconstitutional, but the court assumed that his challenge relied on the Equal Protection and Due Process Clauses of the Fourteenth Amendment, as well as related provisions of the Kansas Constitution. *Id.* at 16. The court observed that D.H. had clarified at oral argument that he challenged the statute only as applied to him, "a known sperm donor who alleges he had an oral agreement with the twins' mother that granted him parental rights." *Id.* at 16.

Emphasizing that D.H.'s constitutional challenge was an issue "of first impression, not only in Kansas but nationally," *id.* at 17, the court noted that, unlike numerous other states that completely bar sperm donors (other than husbands) from being deemed legal parents in connection with medical insemination procedures, the Kansas statute expressly provides that a donor and a recipient can choose by written agreement to provide for the donor to be a parent. *Id.* at 30.

The court treated D.H.'s equal protection claim as gender-based, *id.* at 31-34, and rejected that claim after identifying numerous "legitimate legislative purposes or important governmental objectives underlying" the Donor Statute and substantially furthered by it. *Id.* at 33-34. The court noted that the statute encourages sperm donation; protects donors from unwanted paternity or support claims; protects female recipients from potential claims of parental

rights by sperm donors, absent a written agreement; and "encourages early resolution of the elemental question of whether a donor will have parental rights . . . while there is still balanced bargaining power on both sides of the parenting equation." *Id.* at 33-34.

In addressing D.H.'s due process challenge to the statute, the court rejected his argument that he was denied "a meaningful opportunity to be heard" on his claim of an oral agreement. *Id.* at 34. The court stated that it accepted D.H.'s evidence regarding an oral agreement for the purpose of reviewing the District Court's summary disposition of the paternity action. *Id.* at 34-35. The court concluded, however, that D.H. was not denied any procedural right because "the statute merely sets up a burden of proof that his own inaction before donating his sperm left him unable to meet." *Id.* at 35. (The assertion by *Amicus Curiae* Alliance Defense Fund ("ADF") on page 1 of its brief that the state court "accepted" that D.H. and S.H. orally agreed that D.H. would have parental rights is incomplete in light of the limited purpose for which the court regarded D.H.'s evidence.)

The court characterized the remainder of the due process challenge as substantive and rejected the contention "that the requirement of a writing transforms what is an otherwise constitutional statute into one that violates D.H.'s substantive due process rights." *Id.* at 36-37. According to the court, the Donor Statute "ensures no *attachment* of parental rights to sperm donors in an absence of a written

agreement to the contrary; it does not *cut off* rights that have already arisen and attached." *Id.* at 37.

The court did not address any constitutional claims on behalf of K.M.H. and K.C.H., but briefly discussed children's interests as a matter of public policy. App. 38-40. The only reference to children's rights was the same description of the Ohio case that D.H. had included in his trial court memorandum. Br. of Appellant D.H. 8 (Kan. Ct. App., transferred to Kan. S. Ct.).

Chief Justice McFarland authored a concurring opinion emphasizing that the Donor Statute protects both parties, enabling a potential donor to "say no deal and walk away" if a potential recipient refuses to enter into a written agreement that the donor will be a legal parent. App. 46, 49.

2. Dissenting Opinions

Two Kansas Court of Appeals judges sitting by appointment dissented. App. 46, 50, 64. Judge Caplinger, joined by Judge Hill, viewed the Donor Statute as violating due process because the statute "permits a donor to waive his right to parent simply by his own inaction rather than through an intentional act relinquishing that right." *Id.* at 54-55. Judge Hill's dissent expressed concern that, as a result of the application of the Donor Statute in this case, the District Court "never got to the point of deciding the best interests of the children." *Id.* at 65.

3. Denial of Motion for Rehearing

D.H. filed a motion for rehearing and a simultaneous request to supplement the record in the Supreme Court. In the motion for rehearing, D.H. asserted fundamental constitutional rights of the children and urged that they be considered in deciding the constitutionality of the Donor Statute. D.H.'s Mot. for Reh'g 7-14 (Kan. S. Ct., Nov. 15, 2007). The Kansas Supreme Court denied the motion for rehearing on December 18, 2007.

REASONS FOR DENYING THE PETITION

This Court should deny the Petition, which concedes that this is a "case of first impression." Pet. 4. There is no conflict of authority among state or lower federal courts regarding the questions presented, and, as explained below, the decision of the Kansas Supreme Court is consistent with this Court's precedents.

Many states facilitate the use of donor insemination by clarifying that a sperm donor is not a legal parent, except in certain circumstances, such as where the donor is married to the recipient and consents to the insemination.[1] Like several other

[1] The Kansas Supreme Court cited to twenty state statutes, including the Kansas statute. *See* App. 18 (citing to statutes of Alabama, California, Colorado, Illinois, Minnesota, Missouri, Montana, Nevada, New Jersey, New Mexico, Ohio,

(Continued on following page)

states' measures, *see* App. 31 (citing statutes of Arkansas, Florida, New Hampshire, New Jersey, and New Mexico), the Kansas Donor Statute includes that general rule, but also provides a clear means by which a man who provides sperm and who is not married to the recipient can be deemed a legal parent of a child born as a result: by entering into a written agreement so providing with the recipient.

The Petition broadly contends that any man "who knowingly donates his sperm to a known unmarried woman automatically has a fundamental right to parent when a child is conceived." Pet. 25. State legislatures, however, have enacted dozens of measures that recognize that being a donor of sperm is not the same as being a legal parent. The Petition's argument, if accepted by this Court, could put at risk the ability of the states to facilitate insemination by known donors, with a resulting reduction in reproductive options for both women and men. There is no need for this Court to weigh in on this issue, and certainly not here, where Kansas law clearly provides that if a man wishes, he can condition his donation of sperm on being deemed a legal parent of any resulting child.

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and Wisconsin); *id.* at 21 (Connecticut, Idaho, and Virginia); *id.* at 25-26 (Oregon); *id.* at 31 (Arkansas, Florida, New Hampshire). At least five other states have such statutes. *See* N.D. Cent. Code § 14-20-60; Tex. Fam. Code Ann. § 160.702; Utah Code Ann. § 78-45g-702; Wash. Rev. Code § 26.26.705; Wis. Stat. § 891.40(2); Wyo. Stat. Ann. § 14-2-902.

Given the competence of state legislatures and courts to protect the interests of all parties connected to medical insemination procedures under state domestic relations laws, this Court should not review novel questions of constitutional law that would benefit from further consideration in the courts of the states.

Moreover, several of the issues raised in the Petition and the briefs of supporting *amici curiae* were not timely raised below and were not decided by the Kansas Supreme Court. In particular, D.H. did not timely raise any specific constitutional claims on behalf of the children, K.M.H. and K.C.H., and the Kansas Supreme Court therefore did not decide any question regarding the children's rights under the Due Process or the Equal Protection Clauses. *See infra,* Section III. The Petition's fourth and fifth questions therefore are not properly presented. There are also serious prudential standing concerns with respect to those questions. *See infra,* Section V.

In addition, although *amicus curiae* ADF argues that application of the Donor Statute to D.H. impermissibly discriminates based on gender, Br. of *Amicus Curiae* Alliance Defense Fund ("ADF Br.") 16-22, the Petition itself does not ask this Court to consider that question, but instead argues that the Kansas Supreme Court mischaracterized D.H.'s equal protection claim in treating it as gender-based. Pet. 27. There is clearly no need for this Court to review any gender-based equal protection issue here.

As further explained below, the Kansas Supreme Court's decision is correct. Application of the Donor Statute did not violate D.H.'s rights under the Equal Protection Clause or Due Process Clause. This Court should deny the Petition.

I. This Court Should Deny The Petition Because There Is No Conflict Among State Or Federal Decisions.

As the Kansas Supreme Court recognized, App. 17, and as the Petition concedes, Pet. 4, the constitutional questions in this case are issues of "first impression" that no other courts – state or federal – have addressed. The Kansas Supreme Court's decision accordingly does not conflict with any published state court or federal court decision, and this Court should deny review.

ADF points to two appellate cases – both intermediate state appellate court decisions – that have addressed, in ADF's words, "similar" statutes under "similar circumstances." ADF Br. 6. Neither of those cases presents a conflict with the decision of the Kansas Supreme Court.

In *McIntyre v. Crouch*, 780 P.2d 239 (Or. Ct. App. 1989), a sperm donor claimed that he had provided his sperm "in reliance on an agreement . . . that he would have parental rights." *Id.* at 242. The Oregon donor statute at issue provided that, unless a donor is the woman's husband, the donor "shall have no right, obligation or interest with respect to a child born as a

result of the artificial insemination." *Id.* at 242 n.1. In contrast to the Kansas statute, the Oregon statute did not provide the donor with any mechanism that would allow the mother and the donor to agree that the donor would have status as a legal parent. *Id.* The Oregon court held that the statute could not constitutionally be applied so as to impose an "absolute bar" to paternity, and that the petitioner was entitled to an opportunity to prove that he and the mother had entered into a parenting agreement prior to the insemination – that is, that he "ha[d] 'grasped the opportunity' to 'participate in the rearing of his child.'" *Id.* at 245 (quoting *Lehr v. Robertson*, 463 U.S. 248, 261, 262 (1983)). The Kansas Donor Statute does not pose any such "absolute bar" to a sperm donor having parental rights, but rather provides a means by which a sperm donor can be deemed a legal parent. Accordingly, there is no conflict.

At issue in the other case to which ADF cites, and to which the Petition cites, as well, *see* Pet. 10, was the applicability of an Ohio statute providing that a donor of semen to an unmarried woman for use in a medical insemination procedure is not entitled to the status of parent. *C.O. v. W.S.*, 64 Ohio Misc. 2d 9, 639 N.E.2d 523 (Ohio Ct. of Common Pleas 1994). The Ohio intermediate appellate court addressed the constitutionality of the statute only "[a]ssuming *arguendo*" that the statute applied and concluded that application of the statute would violate due process protections. *Id.* In contrast to the Kansas Donor Statute, the Ohio statute did not provide any

means for a donor to become a parent. Given this material difference, there is no conflict between the Ohio and Kansas court decisions.

The Petition cites to three other state-court decisions, all three of which are trial court decisions, two of which are unpublished, and none of which is in conflict with the Kansas Supreme Court decision. Pet. 32. Two of those trial court decisions involved the parental rights of lesbian partners or spouses with respect to children conceived through medical insemination, but did not concern the rights of sperm donors. *See Beth R. v. Donna M.*, 853 N.Y.S.2d 501 (N.Y. Sup. 2008); *H.M. v. E.T.*, 851 N.Y.S.2d 58 (N.Y. Fam. Ct. 2007) (unreported disposition). In the third case, a Connecticut trial court ruled in an unpublished decision that a known sperm donor had standing to maintain a paternity action where both he and the sperm recipient had signed an acknowledgment of paternity that had the effect of a judgment. *See Browne v. D'Alleva,* 2007 WL 4636692, *12-*13 (Conn. Super. Ct. Dec. 7, 2007) (unpublished opinion). Those cases plainly present no conflict with the Kansas Supreme Court's decision.

II. The Kansas Supreme Court's Decision Of Substantive Due Process Questions Was Correct And Does Not Warrant Review.

This Court has never addressed the constitutional rights of sperm donors, much less announced that a donor of sperm used in a medical insemination

procedure has a fundamental right to parent any child conceived using that sperm. Neither the Petition nor the briefs of *amici* identify any conflict with this Court's decisions. Rather, D.H. and *amici* seek the recognition of a new fundamental right.

As this Court has recognized, "[i]in the vast majority of cases, state law," not federal constitutional law, determines whether a parental relationship exists. *Lehr*, 463 U.S. at 256; *cf. Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (rejecting argument that putative biological father had fundamental right to parent child and upholding state-law presumption that the husband of a married woman is the father of children born during the marriage). Notably, in the context of medically supervised insemination, twenty-five states have enacted statutes that provide that, except in certain circumstances, a man who provides sperm for use in a medical insemination procedure is a *donor*, not a *parent*. *See supra,* n.1 (citing statutes). Because it is often the case that a woman undergoing an insemination procedure and the man providing sperm are not in a marital or other close relationship, many states have recognized the need to spell out clearly whether a donor of sperm for such procedures will be deemed a parent.

The Petition contends that a known sperm donor automatically has a fundamental right to parent if the recipient is unmarried. Pet. 25. This Court has expressly held, however, that "the mere existence of a biological link" is insufficient to give rise to a constitutionally protectible liberty interest under the

Fourteenth Amendment. *Lehr*, 463 U.S. at 261. Although this Court has recognized the fundamental right of legal parents to make decisions concerning the care, custody, and control of their children, *see Troxel v. Granville*, 530 U.S. 57, 65-66 (2000), this Court has refused to extend that right to birth fathers who have no more than a genetic link to a child, *see Lehr*, 463 U.S. at 261. And this Court has never taken the leap that D.H. asks the Court to take here: to recognize a protected liberty interest of a *donor* of sperm to *parent* a child conceived as a result of a medical insemination procedure using his sperm.

As this Court has observed, "[p]arental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring." *Lehr*, 463 U.S. at 259-60 (quoting *Caban v. Mohammed*, 441 U.S. 380, 397 (1979)). Thus, this Court has recognized a constitutionally protected liberty interest where an unmarried father has an established relationship with the mother and the child. *See, e.g., Stanley v. Illinois*, 405 U.S. 645 (1972) (recognizing a protected liberty interest where the biological father lived with the mother for eighteen years and helped raise the children he sought to parent). Where a man has no more than a "mere . . . biological link," however, this Court has declined to recognize a protected liberty interest. *Lehr*, 463 U.S. at 261; *see Quilloin v. Walcott*, 434 U.S. 246 (1978) (finding no liberty interest when the putative father failed to take any action to establish his parental

rights until after adoption proceedings had commenced).

In *Lehr*, 463 U.S. 248, the Court addressed whether New York had adequately protected an unmarried father's "inchoate relationship" with a child he had not supported and had rarely seen. *Id.* at 249-50. The statute at issue required an unmarried father under certain circumstances to record his name in the state's "putative father registry" in order to be entitled to notice of adoption proceedings regarding his child. *Id.* at 250-51. The father in *Lehr* argued that he had a constitutional right to notice and an opportunity to be heard on the ground that "a putative father's actual or potential relationship with a child born out of wedlock is an interest in liberty which may not be destroyed without due process of law." *Id.* at 255. Although the Court recognized that the parent-child bond is "sufficiently vital to merit constitutional protection *in appropriate cases*," *id.* at 256 (emphasis added), the Court concluded that absent any commitment to the responsibilities of parenthood, the father's interest in personal contact with his child did not acquire "substantial protection." *Id.* at 261.

In *Lehr*, the Court noted that New York law had provided a clear step that the putative father could have taken to guarantee notice of any adoption proceedings – "mailing a postcard to the putative father registry." *Id.* at 264. *Lehr* thus supports the Kansas Supreme Court's ruling in this case. Kansas law clearly defines how a sperm donor who is not married

to the recipient can be deemed a legal father. As the Kansas Supreme Court noted, "[e]ven a sperm donor with no relationship to the child's mother can forge and protect his parental rights by insisting on a written agreement." App. 36. In this case, D.H. did not do so.

Although the Donor Statute requires that the donor obtain the recipient's consent, the donor is free to decide not to donate sperm if the recipient will not agree that the donor will be the legal father of any child conceived. (This case thus does not present the fifth question that the Petition lists for review: whether the Kansas Supreme Court's decision erroneously recognizes a woman's "discretionary powers to divest her children . . . from a relationship of companionship and support from their father." Pet. iv.)

Furthermore, there is no warrant for this Court to grant the Petition to consider D.H.'s argument that he has a fundamental interest in parenting the children because of an alleged oral agreement with S.H. regarding parental rights – a matter that S.H. vigorously disputes. D.H.'s Petition is essentially an invitation to dismantle the protections that Kansas and other states have enacted to encourage men to donate sperm—for the sake of donors who are unaware of the law.

D.H.'s asserted ignorance of the writing requirement does not affect the constitutional analysis. In *Lehr,* the putative father had not known that by

mailing a postcard to the putative father registry he would have been guaranteed notice of adoption proceedings, but, as this Court explained, "[t]he possibility that he may have failed to do so because of his ignorance of the law cannot be a sufficient reason for criticizing the law itself." *Id.* at 264.

Contrary to the suggestion in the Petition's third-listed question, this case does not present an issue regarding "an implied waiver of fundamental rights." Pet. iii. The decision of the Kansas Supreme Court is consistent with this Court's precedents requiring that waivers of constitutional rights be made knowingly. Under the Donor Statute, in the absence of a written agreement, a donor has no parental rights to waive. In D.H.'s case, the right to be a legal father simply never attached at all given that D.H. did not enter into a written agreement. *See* App. 37.

The operation of the Kansas statute in this respect is similar to many other rules adopted by the states to determine parental status. The constitutional validity of applying such rules does not hinge on whether potential parents are aware of what the law provides or requires. D.H.'s primary reliance on waiver cases in the criminal context, such as *Johnson v. Zerbst,* 304 U.S. 458 (1938), and *Miranda v. Arizona,* 384 U.S. 436 (1966), *see* Pet. 22, is misplaced. As this Court has long held and recently reaffirmed, "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." *Elk Grove Unified Sch. Dist. v.*

Newdow, 542 U.S. 1, 12 (2004) (quoting *In re Burrus*, 136 U.S. 586, 593-94 (1890)). The Kansas Supreme Court's decision that its parentage statute should apply in this case regardless of whether D.H. was aware of its requirements is unexceptional and does not warrant this Court's review, particularly given that the decision left open the possibility of equitable exceptions in future cases. App. 44-46.

As explained in Section IV.B below, even were any fundamental right implicated by the application of the Donor Statute to D.H. in this case, the application of that statute would survive strict scrutiny. There is no cause, however, for the Court to review any substantive due process issue here. This is not an arena that this Court should enter. *See Troxel*, 530 U.S. at 93 (2000) (Scalia, J., dissenting) (advising against "a new regime of judicially prescribed, and federally prescribed, family law").

III. The Kansas Supreme Court's Decision Of Procedural Due Process Questions Was Correct And Does Not Warrant Review.

The Kansas Supreme Court correctly ruled, consistently with this Court's precedents, that application of the Donor Statute to D.H. did not violate his procedural due process rights. App. 34-35. That court recognized that the gist of D.H.'s due process claim was substantive, not procedural. *Id.* at 35. Indeed, for purposes of reviewing the trial court's summary disposition of D.H.'s paternity action, the Kansas

Supreme Court *accepted* D.H.'s evidence of an oral agreement. D.H.'s problem, the court rightly concluded, was not that he was denied a meaningful opportunity to be heard, but that "his own inaction before donating his sperm left him unable to meet" the showing required under the Donor Statute. *Id.* Although concluding that D.H. had failed to preserve any equitable arguments or to proffer evidence supporting his allegations of improper conduct by S.H., the court expressly held open the possibility that in future cases donors might be able to make factual showings that would justify excusing the writing requirement for equitable reasons. *Id.* at 45-46.

A plurality of this Court similarly rejected a procedural due process claim in *Michael H. v. Gerald D.*, 491 U.S. 110, 119 (1989) (plurality opinion of Scalia, J.). The plurality examined a California statute imposing a conclusive determination that, with certain exceptions, a child born to a woman cohabiting with her husband was presumed to be a child of the husband. *Id.* at 117-18. A man who had engaged in an adulterous affair with a married woman and then sought paternity rights with respect to a child so conceived contended that he was deprived of procedural due process by application of the statute's conclusive determination. *Id.* at 115-16. The plurality rejected the procedural due process challenge, concluding that the paternity statute was "a substantive rule of law" under which, in certain circumstances, it was "*irrelevant* for paternity purposes" who the biological father of the child was. *Id.*

at 119. The same analysis applies here, where an oral agreement, even if it could be shown, simply fails to satisfy the substantive requirement of the Donor Statute that there be a written agreement.

D.H. and ADF erroneously suggest that the Kansas Supreme Court's opinion is at odds with *Stanley v. Illinois,* 405 U.S. 645 (1972), in which this Court held that an unmarried father was entitled to a fitness hearing before his children could be taken away from him after the death of their mother. Pet. 12, 19, 23; ADF Br. 14-15. Under Illinois law, an unmarried father in such circumstances was presumed unfit without any hearing. *Stanley,* 405 U.S. at 646. The result and reasoning of *Stanley* are distinguishable from this case. First, in *Stanley*, the petitioner's "private interest" for due process analysis was strong: he was initially a legal father, living with children he had "sired and raised," who were then separated from him by the state after the death of the children's mother. *Id.* at 651. This Court, of course, has never identified any liberty interest of a sperm donor in being deemed a legal father of children conceived through a medical insemination procedure. No such interest attaches as it would from raising a child.

Second, in *Stanley*, the state's asserted interest in the challenged presumption was administrative efficiency, which the Court found "insufficient to justify refusing a father a hearing when the issue at stake is the dismemberment of his family." *Id.* at 658. The Donor Statute, by contrast, serves numerous

important interests: encouraging able men to donate sperm to thereby expand reproductive options for married and unmarried women, protecting donors from unwanted paternity claims, and protecting recipients and the stability of their family units.

Third, parental fitness is not at issue here as it was in *Stanley*. In *Stanley*, the father was presumed unfit to continue as a parent. *Stanley,* 405 U.S. at 646-47. The Donor Statute does not address any party's fitness to be a parent, but rather sets forth circumstances under which a provider of sperm is a parent.

To the extent that D.H. cites to *Stanley* seeking support for his claim that he is entitled to an opportunity to prove an oral agreement, the Kansas Supreme Court made plain that he was not denied a hearing on that issue. App. 34-35. Indeed, the court accepted his evidence for the purpose of reviewing the trial court's summary disposition of the paternity action and indicated the possibility that it would have considered equitable arguments and evidence had he preserved such arguments and proffered such evidence. *Id.* at 34-35, 45-46. D.H.'s problem is not procedural; it is that he cannot satisfy the substantive showing required by Kansas law: a written agreement.

In light of D.H.'s lack of a liberty interest as a donor, the important nature of the state's interests, and the lack of utility of any further procedural opportunities, the Kansas Supreme Court's rejection

of D.H.'s procedural due process challenge was correct and consistent with this Court's rulings. All that D.H. seeks is correction of purported error, and there was none here.

IV. The Kansas Supreme Court's Decision Of Equal Protection Questions Was Correct And Does Not Warrant Review.

The Petition's discussion of D.H.'s equal protection challenge to the Donor Statute fails to allege any conflict among the decisions of state or lower federal courts or to allege that the decision of the Kansas Supreme Court conflicts with any of this Court's rulings. Pet. 23-28.

In the Kansas Supreme Court, D.H. limited his as-applied equal protection challenge to the situation of "a known sperm donor who alleges he had an oral agreement with the [children's] mother that granted him parental rights." App. 16. There is no need for this Court to grant the Petition given the limited scope of D.H.'s challenge and given that the parties vigorously dispute whether there was such an oral agreement. As explained below, the Kansas Supreme Court decision correctly applied this Court's precedents, and this case does not present any equal protection issue that would warrant granting the Petition.

A. D.H. Does Not Pursue Any Argument That The Kansas Donor Statute Impermissibly Discriminates Based On Gender, And No Gender-Based Discrimination Issues Warrant Review.

Although the Kansas Supreme Court decided that the Donor Statute does not impermissibly discriminate based on gender, it appears that D.H. does not pursue a gender-based equal protection argument in this Court. His second Question Presented asks "[w]hether the Kansas Supreme Court erred in applying an intermediate level of scrutiny *as if* the equal protection claim was gender-based," Pet. iii, and the Petition elsewhere states that "[t]he Kansas Supreme Court mischaracterized D.H.'s equal protection argument as gender-based," *id.* at 27. The brief of *amicus* ADF does include gender-discrimination arguments, but ADF merely seeks correction of purported errors in the Kansas Supreme Court's application of intermediate scrutiny. *See* ADF Br. 20; App. 32. There is no such error.

First, the Donor Statute does not discriminate based on gender because males as sperm donors and females as recipients are not similarly situated for purposes of equal protection analysis. *See Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985) ("The Equal Protection Clause . . . is essentially a direction that all persons similarly situated should be treated alike."). The Kansas Supreme Court wisely expressed skepticism of the contrary argument, but

assumed simply for purposes of argument that D.H. and S.H. were similarly situated. App. 33. As this Court has acknowledged, however, "[p]hysical differences between men and women . . . are enduring." *U.S. v. Virginia,* 518 U.S. 515, 533 (1996) (citation omitted).

A sperm donor and a woman who is receiving donated sperm in a medical insemination procedure are not similarly situated. The recipient is receiving donated sperm and consenting to a medical procedure that, if successful, will result in her becoming pregnant and giving birth to a child and being a mother. *Cf. Nguyen v. INS*, 533 U.S. 53, 65 (2001) ("The mother knows that the child is in being and is hers and has an initial point of contact with him.").

A donor other than a consenting husband of the recipient may or may not have any desire to participate in the life of the child in any way or to establish any relationship with the child, unlike the recipient, who will at least have the initial relationship of birth and who is consenting to that initial relationship. Indeed, the donor may not even be aware of whether the recipient conceived as a result of the donated sperm. *Cf. Nguyen,* 533 U.S. at 65 ("Given the 9-month interval between conception and birth, it is not always certain that a father will know that a child was conceived."). The donor and the recipient are not similarly situated.

Even assuming that the Donor Statute's differentiation between sperm donors and recipients can be

deemed a classification based on gender, the Kansas Supreme Court correctly determined that the statute survives intermediate scrutiny because the classification in the statute "serves important governmental objectives and . . . the discriminatory means employed are substantially related to the achievement of those objectives." *U.S. v. Virginia*, 518 U.S. at 533.

The Kansas Supreme Court identified numerous "legitimate legislative purposes or important governmental objectives underlying" the Donor Statute. App. 33. The court noted that the statute "encourages men who are able and willing to donate sperm" to both married and unmarried women who wish to "become parents without engaging in sexual intercourse," either as a matter of "personal choice or because their husbands or partners are infertile, impotent, or ill," while "protecting the men from later unwanted claims for support from the mothers or the children." *Id.* The court observed that the statute also protects female recipients from potential claims of parental rights by sperm donors, absent a written agreement. *Id.* While not imposing a time limit on the entry of a written agreement, "the statute implicitly encourages early resolution of the elemental question of whether a donor will have parental rights . . . while there is still balanced bargaining power on both sides of the parenting equation." *Id.* at 33-34. The court held that "the statute's gender classification substantially furthers and is thus substantially related to these legitimate legislative purposes and important governmental objectives." *Id.* at 34.

ADF erroneously argues that the state's interest in protecting against the creation of parental status for donors absent agreement of both parties is impermissibly based on "overbroad generalizations" regarding gender – namely, an assumption that, when not married to each other, neither a donor nor a recipient desires for the donor to have parental rights. ADF Br. 21 (quoting *Weinberger v. Wiesenfeld*, 420 U.S. 636, 643 (1975) (internal quotation marks omitted).) ADF cites to *Caban v. Mohammed*, 441 U.S. 380 (1979), in which this Court held that "a natural parental interest shared by both genders alike" could not serve as a rational basis for a law that permitted an unmarried mother, but not an unmarried father, to block adoption of their child by withholding her consent. *Id.* at 391-92; ADF Br. 21-22.

The Donor Statute, however, is not based on stereotypes about whether *men* wish to be parents or *women* wish to be parents. Rather, the Donor Statute is based on whether the acts involved in sperm donation and receipt of donated sperm in a medical procedure necessarily indicate consent to parental status. A recipient of donated sperm, by consenting to the medical insemination procedure, is demonstrating consent to the possibility of pregnancy and giving birth to a child, which will result in the recipient having the legal status of a parent. A sperm donor other than a husband, however, does not, by that mere act of sperm *donation* indicate any consent to

being a legal parent, and in most instances likely has no such intent.

In addition, a sperm donor by the act of donation indicates consent to the recipient's becoming a legal parent by virtue of the expectation that the recipient may bear a child. A recipient of donated sperm, however, does not, by undergoing a medical insemination procedure, indicate any consent to the bestowal of parental rights on a donor to whom she is not married. The Donor Statute reflects those different circumstances, not gender stereotypes.

There is no cause for this Court to grant the Petition to consider the Petition's contention that the Donor Statute discriminates between certain classes of men. The Petition states that D.H.'s "equal protection claim is that he be treated like other unwed fathers," Pet. 28, presumably meaning unmarried men who become fathers as a result of sexual intercourse. There are important differences, however, between sexual intercourse and medical insemination procedures, including the often unplanned nature of pregnancies from intercourse and the *necessarily* preplanned, methodical aspect of pregnancies resulting from insemination procedures.

B. The Donor Statute Does Not Discriminate Based On Fundamental Rights And Would Survive Strict Scrutiny In Any Event.

The Petition argues that, as applied, the Donor Statute violates the Equal Protection Clause by impermissibly discriminating with respect to his "fundamental parental rights." Pet. iii. To the extent D.H.'s Equal Protection claim is based on a claimed fundamental right of a provider of sperm to be deemed a legal parent, that claim fails for the reasons explained above in Section II. There is no such fundamental right.

Even if there were such a right, the Donor Statute would survive strict scrutiny. The Kansas Supreme Court had no need to consider whether the state's interests served by the Donor Statute are compelling because it rejected D.H.'s argument that a fundamental right was implicated by application of the Donor Statute here. Nevertheless, the government objectives that the Kansas Supreme Court identified as important – enabling men and women to expand their reproductive options, including without sexual intercourse; encouraging men to donate sperm by protecting them from claims for support; clearly and predictably protecting women from claims by donors for parental rights not agreed to, *see* App. 33-34 – are indeed compelling.

ADF argues that the Donor Statute is not narrowly tailored and cannot survive strict scrutiny

because "it does not encapsulate the expectations of every participant in an artificial insemination arrangement." ADF Br. 20. That is not a showing Kansas need make – and not simply because this case presents only an as-applied challenge. While the Donor Statute's requirements may turn out to be disappointing to persons who are unaware of that statute's requirements, the statute is narrowly tailored to the interests it serves and provides every donor and every recipient a clear opportunity – at the most opportune moment in the donation decision-making process – to document their expectations in writing.

Under the Donor Statute, any donor who wishes to parent a child resulting from his donation of sperm through a medical insemination procedure may insist on parental rights as a condition of donating sperm and enter a written agreement; any donor who does not intend to assume parental rights and responsibilities may decline to enter into such a written agreement. Both a donor and a recipient unsatisfied with the other's choice on the matter are free to walk away from the arrangement before the sperm is donated. Moreover, as the Kansas Supreme Court decision makes clear, there may be cases in which lack of a written agreement would be excused for equitable reasons (although this is not such a case, given D.H.'s waiver of equitable arguments under Kansas law).

ADF also suggests that the Donor Statute is not narrowly tailored because it would be possible to

draft a *more restrictive* statute requiring all participants in medical insemination procedures to state in writing their intentions regarding parental rights. ADF Br. 19. States may choose such a route, but the Constitution does not require it.

Although domestic relations laws, including laws governing parental rights, are subject to federal constitutional constraints, the mere existence of applicable equal protection or due process protections does not mean that the various states must invariably arrive at the same "solution" to family relations questions. Because "[i]t is indisputably the business of the States, rather than a federal court employing a national standard, to assess in the first instance the relative importance of the conflicting interests that give rise to disputes such as this," *Troxel v. Granville*, 530 U.S. 57, 90-91 (2000) (Stevens, J., dissenting), the federal courts should accept that states may choose different, yet equally constitutional rules regarding who will be deemed a parent.

V. Questions Regarding The Constitutional Rights Of K.M.H. And K.C.H. Are Not Properly Presented Here, And Their Rights Were Not Violated By Application Of The Donor Statute.

Although D.H. and *amici* urge this Court to decide questions regarding the constitutional rights of K.M.H. and K.C.H., D.H. has waived any right he may have had to press arguments about the

childrens' constitutional rights. This case also raises serious prudential standing concerns and would be a poor vehicle for this Court's consideration of novel questions about the constitutional rights of children conceived through medical insemination procedures.

D.H. and *amici* argue that the Kansas Donor Statute violates the children's equal protection rights. *See* Pet. 28-32; ADF Br. 23-26; Br. of *Amici Curiae* Keys for Networking, Inc. and Milfred Dale, Ph.D. ("Keys Br.") 14-19. Keys *Amici* also contend that the Kansas statute violates the children's due process rights. Keys Br. 5-14. Those arguments, however, were not timely raised below or addressed by the Kansas courts, and should not be considered by this Court. *See, e.g., Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 168-69 (2004) ("We ordinarily do not decide in the first instance issues not decided below") (quoting *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 109 (2001).)

Neither D.H.'s trial court brief nor his opening brief before the Kansas Supreme Court asserted specific constitutional rights on behalf of K.M.H. and K.C.H. Rather, those briefs' only references to the rights of children in general were contained in a description of an Ohio case as holding a statute "unconstitutional because public policy supports the concept of legitimacy and the concomitant rights of a child to support and inheritance." D.H.'s Mem. Br. 7. The Kansas Supreme Court briefly discussed children's interests, but as a matter of public policy in response to an *amicus curiae*. App. 38-40. D.H.'s

motion for rehearing in the Kansas Supreme Court argued that the Donor Statute violates the children's constitutional rights, but the Kansas Supreme Court denied rehearing. App. 1.

This case also presents troublesome prudential standing concerns.[2] D.H. has no parental rights with respect to K.M.H. and K.C.H. Although D.H. was permitted to bring this paternity suit under a Kansas statute that permits "any person" to file a paternity action "on behalf of . . . a child" as next friend, Kan. Stat. Ann. § 38-1115(a)(1), the children also have a guardian ad litem who was appointed by the trial court in S.H.'s CINC petition action, which was then consolidated with D.H.'s paternity action. Given this Court's preference "to leave delicate issues of domestic relations to the state courts," *Elk Grove Unified School Dist.*, 542 U.S. at 13, there is a distinct possibility that this Court would rule as a prudential matter that Petitioner lacks standing to raise constitutional claims on the basis of alleged violations of the children's rights.

In *Elk Grove Unified School District v. Newdow,* this Court held that a father who lacked legal custody of his daughter and was prevented under California law from suing as her "next friend," lacked prudential

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[2] The Petition's third Question Presented suggests that the Kansas courts "denied D.H. standing on the merits of the CINC and paternity petitions." Pet. iii. The Kansas Supreme Court affirmed the dismissal of the paternity action, but not on "standing" grounds. The CINC petition was dismissed as moot. *See id.* at 75.

standing to challenge a school district policy in federal court. 542 U.S. at 17-18. This case differs from *Elk Grove Unified School District* in that this case comes from a state court and a Kansas statute authorizes D.H. to file a paternity action as "next friend." *See* Kan. Stat. Rev. § 38-1115. Nevertheless, prudential standing concerns exist here regarding D.H.'s attempt to raise constitutional claims on behalf of K.M.H. and K.C.H.

This Court generally does not permit litigants to assert claims on behalf of third parties, *see, e.g.*, *Singleton v. Wulff*, 428 U.S. 106, 113-14 (1976), but has provided exceptions when, among other requirements, "there [exists] some hindrance to the third party's ability to protect his or her own interests." *Powers v. Ohio*, 499 U.S. 400, 411 (1991). The hindrance faced by the third party must be a "genuine obstacle" to the effective assertion of his or her own rights. *Singleton*, 428 U.S. at 116-17.

In this case, because the children have a court-appointed guardian ad litem to represent their legal interests, they do not face any hindrance in asserting their constitutional rights. The guardian ad litem has seen no need to oppose application of the Donor Statute or to raise any constitutional claims on behalf of the children. This Court therefore should deny the Petition in light of the possibility that the interests of D.H., who seeks this Court's review, diverge from the interests of the children. *Cf. Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 80 (1978) ("There are good and sufficient reasons for this

prudential limitation on [third-party standing] . . . [including] the avoidance of the adjudication of rights which those not before the Court may not wish to assert").

Even if the children's constitutional claims were properly presented, this Court should deny review because there is no apparent conflict in state or federal court decisions regarding the equal protection and due process rights of children conceived through artificial insemination. Nor does the Kansas Supreme Court's decision conflict with this Court's decisions.

In arguing that application of the Donor Statute violates the rights of the children, D.H. and *amici* cite to this Court's cases concerning illegitimacy statutes. In those cases, this Court applied intermediate scrutiny and invalidated statutes the clear purpose of which was to discriminate against illegitimate children for the sake of punishing their parents. *See, e.g.*, *Clark v. Jeter*, 486 U.S. 456, 461 (1988). The Donor Statute has no such discriminatory purpose. Rather, the Donor Statute encourages sperm donation and conception that results in the very existence of children, while serving the state's important, indeed compelling, interests in protecting the expectations of donors and recipients. Because the Donor Statute withstands intermediate scrutiny, there is no conflict with this Court's case law.

Nor does application of the Donor Statute impinge on the children's due process rights – procedural or substantive. This Court has never held that

children have a protected liberty interest in maintaining a filial relationship with their parents. *See Michael H.*, 491 U.S. at 130 (plurality). If children were held to have a liberty interest in maintaining a filial relationship with sperm donors, many men who otherwise might have been willing to donate might choose not to do so, in order to protect themselves from potentially unwanted claims for parental support. This Court should not consider any such issues here.

CONCLUSION

Respondent respectfully requests that the Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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In The

Supreme Court of the United States

IN THE INTEREST OF:
K.M.H., A Child Under the Age of Eighteen
And
K.C.H., A Child Under the Age of Eighteen
IN THE MATTER OF THE PATERNITY OF:
K.C.H. and K.M.H. by and through their next friend,
DARYL D. HENDRIX,

Petitioner,

v.

SAMANTHA HARRINGTON,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of The State Of Kansas

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

Human artificial insemination originated as a means by which married couples who had encountered problems with fertility could bring children into the world and perpetuate their families, and as such, is not an evil. However, the Kansas Supreme Court, through a mechanistic application of a "generative statute of frauds" has worked a decided evil by treating two children who had no voice in the means of their conception as chattel, divesting them from the only father they have, severing them from strong and elemental biological ties which cannot be discounted as meaningless, and alienating them from the love, affection and support of an honorable man who took every possible step to see them come into the world, and grasped every opportunity available to him to be their father.

Petitioner maintains that the Kansas Statute in issue is unconstitutional, as applied to the facts of his case.[1] Kansas has enshrined one parent's purported

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[1] In Page 12 of her Response, S.H. seeks to build a straw man. S.H. maintains that granting the writ would put at risk the ability of states to facilitate insemination by known donors. If it was not made clear in the initial Petition, it should be emphasized here that D.H.'s challenges to the Kansas Statute are made as applied by the Kansas Supreme Court, and are made in the context of a known donor *who had no intention of waiving his parental rights or of having his parental rights cut off ab inito.* The specter of a shortage of known donors who make a truly informed decision to contribute to the conception of children without making a claim to parental rights and accepting parental and financial responsibilities should alarm no one. It would appear that taking S.H.'s argument to its logical conclusion, that the only way that a known donor would be

"right" to have children free and clear from their father, to the detriment of the children's best interests. In doing so, the Kansas Supreme Court has violated the father's and his children's rights to substantive and procedural due process and equal protection as guaranteed by the Constitution of the United States, which are their birthrights as natives of this land.

REASONS FOR GRANTING THE PETITION

Respondent's presentation of this case is flawed in that she repeatedly and persistently mischaracterizes the circumstances of the conception of the children as an antiseptic "medical procedure," a virtual parthenogenesis, with Petitioner relegated to a role of near total insignificance. In addition, Respondent has made an untenable argument that Petitioner has waived the children's constitutional claims. However, the fundamental problem with Respondent's legal position, and the fundamental flaw in the core legal holding of the Kansas Supreme Court is that as applied, the provision for a writing is deemed to be so conclusive and determinative as to cut off parental rights as a matter of law.

The Kansas Supreme Court has decided an important federal question in a way which is in sharp conflict with the holdings of other courts of various States, and of the holdings of this Court. This conflict, in and of itself, brings this cause within the ambit of

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involved in artificial insemination would be if he were somehow duped into participation.

Supreme Court Rule 10, and warrants the granting of the Petition for Certiorari. Further, the Kansas Supreme Court has decided an important question of federal law that has not, but should be settled by this Court.

I. This Court Should Grant The Petition Because There Is A Conflict Between The Kansas Supreme Court And The Holdings of This Court With Respect To The Termination of A Fundamental Right, And The Holdings Of Several State Courts of Last Resort That Have Interpreted Similar or Analogous Statutes, and Have Reached Contrary Results which Implicate the Petitioner's Substantive and Procedural Due Process Rights.

To date this Court has not directly addressed a case involving parental rights in the context of artificial insemination. Only four cases decided by this Court even mention the words "artificial insemination."[2] However, this Court has held conclusively that having children is a fundamental liberty interest. This Court has in its past holdings found that rights to raise one's children, are fundamental, and cannot be severed without due process. *Stanley v. Illinois*, 405 U.S. 645

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[2] *Marcus v. Search Warrants of Property at 104 East Tenth Street, Kansas City, Mo.*, 367 U.S. 717 (1961); *Roe v. Wade*, 410 U.S.113, 161 (1973) (*See* Footnote 62); *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 67 (1976) (*See* footnote 9),; and most recently in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

(1972), *Quillon v. Walcott*, 434 U.S. 246 (1978), *Caban v. Mohammed*, 441 U.S. 380 (1979), *Lehr v. Robinson*, 463 U.S. *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000), *Michael H. v. Gerald D.*, 491 U.S. 110, 123 (1989).

The facts of the instant case do not deal with an unmarried interloper intruding into the sanctity and stability of a two parent family. Instead, in issue is the application of a statute in such a way as to forever bar the existence of a paternal relationship, by means of a writing requirement, which as applied, acts as an irrebutable presumption of non paternity. The application of the statute by the Kansas Supreme Court runs counter to the holdings of several state courts of last resort, which, in examining similar fact patterns and analogous statutes, have safeguarded the substantive and procedural due process rights of known donors who wished to undertake parenting rights and responsibilities, by allowing evidence to be presented of the intent of the parties, even where such evidence of intent would be otherwise barred.

In the case of *K.M. v. E.G.* the California Supreme Court examined the right of a female gamete donor to present evidence of an oral undertaking to parent, even when she had signed a comprehensive written instrument at the time of the donation, waiving all of her potential parental rights. *K.M. v. E.G.* 37 Cal. 4th 130 (2005). This case dealt with a woman who had donated her eggs to her former lesbian partner so that the lesbian partner could bear a child. The *in vitro* fertilization was performed by a fertility clinic. The donor had signed a four page consent form on the

medical center's letter head entitled "Consent Form For Ovum Donor (Known). The form stated that the donor agrees "to have eggs taken from my ovaries, in order that they may be donated to another woman. . . . It is understood that I waive any right and relinquish any claim to the donated eggs or any pregnancy or offspring that might result from them. I agree that the recipient may regard the donated eggs and any offspring resulting therefrom as her own children. . . . I specifically disclaim and waive any right in or any child that may be conceived as a result of the use of any ovum or egg of mine, and I agree not to attempt to discover the identity of the recipient thereof." *Id.* at 135, 136. In the trial court proceedings, the birth mother testified that she would not have accepted the donor's ova if the donor had not signed the consent form, because the birth mother wanted to have a child on her own and believed the consent form "protected her in this regard." *Id.* at 136.

After the lesbian partnership broke down, the donor filed a legal action for custody and visitation. The superior court granted the birth mother's motion to dismiss, finding, in a statement of decision, that the donor "knowingly, voluntarily and intelligently executed the ovum donor form, thereby acknowledging her understanding that, by the donation of her ova, she was relinquishing and waiving all rights to claim legal parentage of any children who might result from the *in vitro* fertilization and implantation of her ova in a recipient . . . Her position was analogous to that of a sperm donor. The Court finds no reason to treat ovum

donors as having greater claims to parentage than sperm donors. . ." *Id.* at 136, 137.

The California Court of Appeal affirmed the judgment. *Id.* at 137. The Court of Appeal held that "the status of K.M. is consistent with the status of a sperm donor under the [Uniform Parentage Act], i.e., treated in law as if he were not the natural father of a child thereby conceived. . ." *Id.*

The California Supreme Court reversed, citing to its case of *Johnson v. Calvert*, 5 Cal. 4th 84, 87, 100 (1993).

The California Supreme Court in K.M.ruled that because two women each presented acceptable proof of maternity, "*we do not believe this case can be decided without enquiring into the parties' intentions.*" *Id.* at 142, citing *Johnson v. Calvert*, at 93. In overruling the trial court's holding that by signing a waiver form, the donor had thereby relinquished and waived all rights to claim legal parentage, the *K.M.* Court held that such an agreement could not be enforced, as it is "well established that parents cannot, by agreement, limit or abrogate a child's right to support." *Id.* at 145. Other related state supreme court cases which have allowed the introduction of evidence of the intent of the parties, even where the operative statute could be seen as acting as an absolute to parentage are *In Interest of R.C.*, 775 P.2d 27 (Colo. 1989), *In re: Marriage of Adams*, 133 Ill. 2d 437 (1990). These rulings speak to the high level of protection and care that need to be taken when addressing the termination of the fundamental liberty

interests involved in parentage and parent-child relationships.

If the carefully drafted waiver, (made available to both parties in the state where the donation took place, more than likely prepared by hospital attorneys) in the *K.M.* case cannot defeat parentage, neither should the instant statute, particularly in light of the fact that many of the safeguards incident to a "medical procedure," such as informed consent and execution of waivers were absent in this case, because the insemination took place in Missouri, a state where by operation of its laws D.H. would be legally the father, and consequently there was no incentive for the Missouri physician, who could have acted as a "gatekeeper" to advise D.H. about the provisions of the Kansas statute. D.H. Trial Court Memorandum Brief, p. 6.

On pages 16-17 of the Response, Respondent mischaracterizes the fundamental right involved in this case as the parental right of a "donor of sperm used in a medical insemination . . . to parent any child conceived using that sperm." That broad characterization of the right does not adequately characterize the fundamental right at issue here. The fundamental right at issue in a case must be "carefully formulat[ed]" by the parties. *Glucksberg*, 521 U.S. at 722. The right at issue is the fundamental parental right of a father who has agreed with the mother to jointly raise a child conceived via artificial insemination, which merits substantive and procedural protection under the due process clause.

On Pages 17 and 18 of the Response, Respondent points out that a mere biological link is not sufficient to establish fundamental rights of parents. However, while a biological link, standing alone, is not sufficient to establish a father's parental rights under the Constitution, the *Lehr* Court recognized that the fundamental rights of a father attach when he "demonstrates a full commitment to the responsibilities of parenthood by coming forward to participate in the rearing of his child." *Lehr*, 463 U.S. at 261. Here, Petitioner has made that showing. When Petitioner agreed to be an active part of his children's lives, his constitutional parental rights attached. In her Response, Respondent relies heavily on *Lehr* in an attempt to defeat Petitioner's claim to parentage. *Lehr* can be distinguished. The putative father in the *Lehr* case "did not seek to establish a legal tie until after [his daughter] was two years old." *Id.* at 262. Here, D.H. has desperately sought his parental rights from the time his children were born-e.g., he filed his paternity suit two weeks after their birth. The New York statute in *Lehr* involved a step that could be unilaterally taken by the father, namely, the mailing of a postcard to the putative father registry. Here, the Kansas statute requires a writing that must be signed and agreed to by the mother. This bilateral step, which cannot be taken solely by the father, does not provide the father the same type of protection afforded by the New York law in *Lehr*. Further, the safeguards normally attendant to a medical procedure, which involve informed consent and record keeping, were not present here. There is no definition in the Kansas statute for the type of writing

required, and how it will be recorded and safeguarded. The statutory provisions as to the writing are therefore unconstitutionally vague. The statute in *Lehr* provided for a mechanism for putting the world on notice of a putative father's desire for notification, and of his claim to paternal rights. There was a bureaucracy in place, which could keep track of, record, and provide a permanent index of parental claims. This is missing in the Kansas scheme. On page 20 of the Response , Respondent maintains that "D.H.'s asserted ignorance of the writing requirement does not affect the constitutional analysis." Petitioner agrees that his ignorance of the law does not affect the constitutional analysis. It is not his ignorance of the law that creates the unconstitutional result; it is the unlawful presumption against fundamental rights created by the Kansas statute.

II. The Kansas Statute Violated Petitioner's Rights to Equal Protection

Respondent states that "D.H. does not pursue any argument that the Kansas Donor Statute impermissibly discriminates based on gender." Response, p. 27. In response, Petitioner is making that argument in addition to the equal protection argument based on the fundamental right to parent one's child. In the same page Respondent states that "[M]ales as sperm donors and females as recipients are not similarly situated" Yet they are similarly situated for purposes of maintaining their constitutional parental rights: they both contribute to the biological endowment of the child, and both should have an equal opportunity to share in the

upbringing of that child by exercising their parental rights. This statute offends equal protection by giving the mother veto power after the birth of the children, as a plain reading of the statute does not rule out an agreement to co-parent, even years after the children's birth.

III. This Court Can Properly Consider the Constitutional Rights of the Children, Whose Rights to Filiation, Child Support and Paternal Involvement and Inheritance Were Summarily Severed Without Due Process or Compelling Justification.

This Court can properly consider the constitutional rights of the children This case is a paternity suit. Without citing authority, S. H. contends that D.H. did not properly preserve the rights of the children by asserting constitutional claims on their behalf in the lower courts. Generally, issues must be raised in lower courts in order to be preserved. This principle does not demand the incantation of particular words; rather, it requires that the lower court be fairly put on notice as to the substance of the issue. *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 469, (2000). In his Trial Court Memorandum, D.H. discussed a Texas case, wherein a father was found to have standing to litigate the issue of paternity. (Memorandum p.4, 5, citing to *In re: Sullivan*, 15 S.W. 3d 911 (Ct. App. Texas 2005). D.H. further addressed the issue of the constitutionality of the Statute, and discussed an Ohio case which examined public policy supporting the concept of

legitimacy and the concomitant rights of a child to support and inheritance. (Memorandum Brief of Daryl D. Hendrix, p. 7, citing *C.O. v. W.S.*, 639 N. E. 2d 523 (1994). In his Motion for Rehearing before the Kansas Supreme Court, D.H. raised specific constitutional violations surrounding the constitutionality of the Kansas statute as applied to the children. The Kansas Supreme Court had an opportunity to review and decide on these issues; however, the Kansas Supreme Court denied the Motion for Rehearing without a detailed opinion. This Court has repeatedly recognized that the "interest primarily at stake in [a] paternity action [is] that of the child," *Pickett v. Brown*, 462 U.S. 1, 16 n.15 (1983) ; *see also Little*, 452 U.S. at 13; and "it is the child who has an interest in establishing a relationship to his father," *Pickett*, 462 U.S. at 16 n.15.Children are unable to assert their own rights; this Court must be vigilant in protecting the rights of those who are unable to do so.[3]

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[3] Respondent argues that the silence of the GAL bespeaks acquiescence to the result. However, on April 24, 2008, Andrey Filipowicz, one of Petitioner's counsels, spoke with the GAL who confirmed that while he did do not intend to file a response to the petition for a writ of certiorari unless one was requested by the Court, he stated that the procedural posture of the proceedings below in the Kansas District Court and the Kansas Supreme Court led to a situation where the best interests of his clients were not evaluated or considered, and he believed that it would be in his clients' best interests if this matter were further evaluated and considered by this Court, so that a determination of the issues would be made on their merits, under an analysis which would take the best interests of his clients into consideration.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Stacie Dallio died tragically and unexpectedly at the age of 31 on July 4, 2008. Stacie came to the United States from Southeast Asia at the age of two with her parents. Realizing one of her lifelong goals, she was admitted to practice law in September of 2005. Her friends and colleagues wish to acknowledge with gratitude her contribution to the Petition for Writ of Certiorari and the instant Reply in this case. Words cannot convey the sadness and loss we feel at her passing.

MOTION FILED
APR 2 1 2008

No. 07-1201

IN THE
Supreme Court of the United States

IN THE INTEREST OF:
K.M.H., A Child Under the Age Eighteen
And
K.C.H., A Child Under the Age Eighteen

IN THE MATTER OF THE PATERNITY OF:
K.C.H. and K.M.H. by and through their next friend,
DARYL D. HENDRIX,

Petitioner,

v.

SAMANTHA HARRINGTON,

Respondent.

On Petition for Writ of *Certiorari* to the
Supreme Court of the State of Kansas

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF THE ALLIANCE DEFENSE FUND AND BRIEF IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

On April 10, 2008, *Amicus Curiae* Alliance Defense Fund ("ADF" or "*Amicus*"), as required by Sup. Ct. R. 37.2(a), notified both Petitioner's counsel and Respondent's counsel of its intent to file this brief *amicus curiae*. Petitioner's counsel consented to this filing, but Respondent's counsel denied consent. Consequently, ADF moves this Court, pursuant to Sup. Ct. R. 37.2(b), for leave to file this brief *amicus curiae*.

ADF is a legal alliance, composed of approximately 1,100 attorneys, committed to the preservation of family values, religious freedom, and the sanctity of life. ADF believes that the family is the most basic unit of society, and that without healthy, functioning families, a culture cannot survive. As a result, ADF advocates for parents' fundamental rights to legal relationships with their children and, similarly, for children's rights to legal relationships with both their mother and father. ADF has been litigating and funding these cases for nearly fifteen years. Indeed, ADF is one of the leading advocates of family rights and values in America.

ADF has participated in fifty cases before this Court, providing direct funding and assistance to parties, as well as funding or authoring briefs *amicus curiae*. Of particular relevance here, ADF funded a brief *amicus curiae* in *Troxel v. Granville*, 530 U.S. 57 (2000) (plurality opinion), where this Court declared, as is relevant here, that "the interest

of parents in the care, custody, and control of their children[] is perhaps the oldest of the fundamental liberty interests," *id.* at 65.

ADF and its many supporters have a heightened interest in assuring that the constitutional rights of parents and children are adequately protected. Eroding the rights of parents and children leads to the further destruction of the family, which, in turn, places an inevitable strain on society. The infringement of these fundamental rights affects more than just the parties involved in this case; it affects society as a whole.

Given ADF's familiarity with Supreme Court practice, and its particularized experience advocating for families, parents, and children, this Court should grant ADF leave to file its brief *amicus curiae.*

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae Alliance Defense Fund ("ADF" or "*Amicus*") is a legal alliance, composed of approximately 1,100 attorneys, committed to the preservation of family values, religious freedom, and the sanctity of life. ADF advocates for parents' and children's rights, seeking to uphold these basic familial relationships against unnecessary and arbitrary disruption by the government.[2]

BACKGROUND

Respondent is an unwed female who desired to have a child through artificial insemination. She asked a friend, Petitioner, if he would provide sperm for the insemination, and Petitioner agreed. Petitioner and Respondent orally agreed that Petitioner would have parental rights to the conceived child—a fact accepted by the state court. *See, e.g.*, App. at 34.

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[1] Neither party's counsel authored this brief in whole or in part, and neither counsel for a party, nor the parties themselves, monetarily contributed to the preparation or submission of this brief. No person other than *Amicus* made any monetary contribution to the submission of this brief.

[2] Counsel of record for all parties received notice at least ten days prior to the due date of *Amicus*'s intention to file this brief. Petitioner's counsel consented to this filing, but Respondent's counsel did not.

Respondent conceived fraternal twins (a boy and a girl).[3] The day after the children's birth, Respondent filed a "child in need of care" (CINC) petition in which she asked the state court to declare that Petitioner had no parental rights. Petitioner, acting in his own capacity, and as "next friend" of his children, filed a separate paternity action. The state court consolidated the two actions.

The state district court found that Petitioner's paternity claim was barred by Section 38-1114(f) of the Kansas Statutory Code, which provides:

> The donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the birth father of a child thereby conceived, unless agreed to in writing by the donor and the woman.

KAN. STAT. ANN. § 38-1114(f). The state district court concluded that because the parties did not enter into a written agreement regarding Petitioner's parental rights, Petitioner could not overcome the bar to paternity imposed by Section 38-1114(f). App. at 72.

The Kansas Supreme Court affirmed the lower court's decision and dismissed Petitioner's constitutional challenges to Section 38-1114(f).

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[3] Petitioner's counsel asked *Amicus* to note herein that Petitioner's twin children are not two girls as erroneously stated in Petitioner's submissions.

Petitioner's equal protection claim challenged the unequal treatment of men's and women's parental rights in the context of artificial insemination. The court applied intermediate scrutiny, identifying four purportedly important governmental objectives underlying Section 38-1114(f): (1) permitting "both married and unmarried women [to] become parents without engaging in sexual intercourse"; (2) "encourag[ing] men . . . to donate sperm to such women by protecting the men from later unwanted claims for support"; (3) "protect[ing] women recipients . . . [by] preventing potential claims of donors to parental rights and responsibilities"; and (4) "enhanc[ing] predictability, clarity, and enforceability" of potential paternity claims by sperm-donating fathers. App. at 33. After enumerating these governmental interests, the court stated, without any analysis, that "the statute's gender classification substantially furthers and is thus substantially related to these . . . important governmental objectives." App. at 34. Based on this lone conclusory proclamation, the Court rejected Petitioner's equal protection claims.

Petitioner also presented due process claims, contending that Section 38-1114(f) deprived him of his fundamental parental rights without a meaningful opportunity to be heard. The court began with the procedural component of Petitioner's due process claim, summarily declaring that Petitioner had "been denied no procedural right to which he was entitled." App. at 35. The court next addressed the substantive due process claim and, in doing so, focused solely on Petitioner's failure to

produce a written agreement as required by statute, reasoning that "[t]he infirmity in [Petitioner's] substantive due process argument . . . lies in the absence of any proof of an agreement with [Respondent] *in writing*." App. at 36. In other words, the court incorrectly premised Petitioner's due process rights on his compliance with a state statute.

Petitioner now seeks further review from this Court.

SUMMARY OF THE ARGUMENT

Amicus supports Petitioner's request for a writ of *certiorari*. This Court will grant the writ where "a state court . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court." SUP. CT. R. 10(c). Here, the Kansas court faced important federal constitutional questions involving both substantive and procedural due process, equal protection, a father's right to parent his children, and children's rights to be free from invidious discrimination. The Kansas court decided these questions incorrectly—"in a way that conflicts with relevant decisions of this Court." Furthermore, the Kansas court's decision also conflicts with the other state courts that have addressed these issues under similar circumstances. *See* SUP. CT. R. 10(b).

The Kansas paternity-barring statute, Section 38-1114(f), is a legislative response to advancements in reproductive technologies. State legislatures have

enacted these statutes primarily to regulate the operation of "sperm banks" (*i.e.*, anonymous sperm donation and artificial insemination facilities),[4] and to conform the law to the general expectation of those involved in anonymous artificial insemination arrangements.[5] But the Kansas court interpreted Section 38-1114(f) too broadly, concluding that it also applies to situations where an unwed mother solicits sperm from a specific, known donor for use in artificial insemination. *See* App. at 40-41. This expansive interpretation of the statute results in clear constitutional violations where, as here, a man who expressly agreed to act as father for his biological children is precluded from a legal relationship with them. Separating a willing and able biological father from his children, and declaring the children to be without a legal father, is repugnant to constitutional principles.

Petitioner is not challenging the constitutionality of the statute on its face or as it applies in other factual circumstances—for example, a man who

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[4] *See McIntyre v. Crouch*, 780 P.2d 239, 246 (Or. Ct. App. 1989) (Deits, J., concurring) (concluding that the legislature, when enacting a similar statute in Oregon, "contemplated" the "situation . . . [where] a mother is inseminated with sperm obtained through a sperm bank from an anonymous donor"); *C.O. v. W.S.*, 639 N.E.2d 523, 525 (Ohio Ct. C.P. 1994) ("Artificial insemination statutes are designed to provide anonymity and protection to both the donor and the mother).

[5] *See* App. at 37 ("We are confident this legislative design realizes the expectation of unknown or anonymous sperm donors."); *In Interest of R.C.*, 775 P.2d 27, 34 (Colo. 1989) (concluding that a similar Colorado statute was "ambiguous" when applied to "the rights and duties of known donors and unmarried recipients").

anonymously donates his sperm to a medical facility, or a man who donates his sperm to a married woman. He is, instead, challenging the constitutionality of the statute as it has been applied to him—a known and solicited sperm donor who agreed with an unwed woman to be the father of their biological children.

The constitutional questions raised by this case are of significant national importance. Section 38-1114(f) is not unique; it is modeled on a widely enacted provision of the Uniform Parentage Act. *See* UNIF. PARENTAGE ACT (2000); 9B U.L.A. 295 (2001). At least twenty-one other states have enacted similar statutes, all of which presume that a sperm-donating father is not the legal father of a child conceived via artificial insemination and born to an unwed mother. *See* App. 79-88. States need guidance on applying these statutes so that the constitutional rights of biological fathers and their children are not unnecessarily trampled. The Kansas Supreme Court's decision currently stands as a prominent precedent on these issues, creating the grave risk that other state courts might follow it. This Court should prevent other courts from being led astray by the Kansas Supreme Court's erroneous decision.

Two other state courts have addressed the constitutionality of similar paternity-barring statutes under similar circumstances. *See McIntyre*, 780 P.2d at 244-45; *C.O.*, 639 N.E.2d at 525. Both courts declared that applying their state's statute to bar a biological father from asserting his parental

rights would amount to clear constitutional violations, *see McIntyre*, 780 P.2d at 245; *C.O.*, 639 N.E.2d at 525. Unfortunately, the Kansas Supreme Court ignored what these courts could not—namely, the firmly embedded constitutional rights of biological fathers and their children. Accordingly, this Court should grant Petitioner's request for a writ of *certiorari* and correct the constitutional errors committed by the Kansas court.

Application of Section 38-1114(f) under these circumstances conflicts with this Court's precedent in four ways. First, it violates Petitioner's substantive due process rights to parent his children. Second, it violates Petitioner's procedural due process rights by denying him a "meaningful opportunity to be heard" prior to the removal of his parental rights. Third, it treats Petitioner unequally from artificially inseminated women by depriving him of his parental rights while preserving those of artificially inseminated women. Fourth, it treats Petitioner's children unequally from children conceived via sexual intercourse by presuming that they do not have a legal father and thereby depriving them of substantial benefits.

ARGUMENT

I. The Kansas Paternity-Barring Statute Violates Petitioner's Parental Rights Under The Substantive Due Process Doctrine.

The Due Process Clause of the Fourteenth Amendment includes a substantive component that

"provides heightened protection against government interference with certain fundamental rights and liberty interests." *Washington v. Glucksberg*, 521 U.S. 702, 719-20 (1997). "The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality opinion); *see also Lehr v. Robertson*, 463 U.S. 248, 261 (1983). This parental liberty interest has been afforded to unwed parents, *see Little v. Streater*, 452 U.S. 1, 13 (1981), including both mothers and fathers alike, *see Weinberger v. Wiesenfeld*, 420 U.S. 636, 652 (1975) ("[A] father, no less than a mother, has a constitutionally protected right to . . . [his] children.") (quotations omitted).

This Court has recognized that the mere existence of a biological link, standing alone, does not automatically merit full due process protection. *Lehr*, 463 U.S. at 261. Nevertheless, this Court has also noted that the biological bond between parent and child is an important factor to be considered:

> The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development.

Id. An unwed father's "interest in personal contact with his child acquires substantial protection under the Due Process Clause" when he "demonstrates a full commitment to the responsibilities of parenthood by coming forward to participate in the rearing of his child." *Id.* (quotations and alterations omitted).

Here, Petitioner's parental interest has acquired substantive due process protection. Prior to the birth of his children, Petitioner and Respondent agreed that Petitioner would have parental rights to his children. In addition, less than two weeks after the children's birth, Petitioner filed this paternity suit seeking his agreed upon and constitutionally guaranteed legal rights to his children. Petitioner thus "demonstrate[d] a full commitment to the responsibilities of parenthood by coming forward to participate in the rearing of his child[ren]." *See id.*

The Kansas Supreme Court improperly construed Section 38-1114(f) as a lawful means to prevent the "attachment" of Petitioner's parental rights. *See* App. at 37. In other words, the Kansas court determined that Section 38-1114(f) requires a father to act affirmatively to acquire his fundamental rights.[6] Yet, it is unprecedented for a state to condition the receipt of a fundamental right on a

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[6] Not only does the Kansas statute require a father to act affirmatively, it also requires him to act specifically. A written agreement is the *only* means by which a biological father can "attach" his parental right to a child of an unwed mother conceived by artificial insemination. If the father is not well versed in the relevant statutory requirements, the protection of his parental rights is left to happenstance—the off-hand chance that he executed a written agreement with the mother.

person's compliance with an arbitrary statutory requirement. Fundamental rights are inherent, *see Glucksberg*, 521 U.S. at 720-21 (noting that fundamental rights are "implicit in the concept of ordered liberty"), they are "rooted in the traditions and conscience of our people," *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934); and they exist independently of a state's decision to grant them. The Kansas court thus erred in declaring that the state could lawfully condition a father's fundamental rights on compliance with an arbitrary state law requirement.

In contrast, Judge Caplinger's dissenting opinion viewed Section 38-1114(f) as a presumed waiver of parental rights. This Court, as recognized by Judge Caplinger, has never upheld a presumed waiver of a fundamental right. To the contrary, this Court has routinely refused to "presume acquiescence in the loss of fundamental rights," *Ohio Bell Tel. Co. v. Pub. Util. Comm'n of Ohio*, 301 U.S. 292, 307 (1937), and has "indulge[d] every reasonable presumption against waiver," *Aetna Ins. Co. v. Kennedy to Use of Bogash*, 301 U.S. 389, 393 (1937). Furthermore, Section 38-1114(f) places an improper burden on the father to demonstrate that he did not waive his parental rights. Typically, it is the government, not an unsuspecting citizen, that must establish a waiver (or lack thereof) of a fundamental right. *See Michigan v. Jackson*, 475 U.S. 625, 633 (1986). But Section 38-1114(f) has inverted the well-established requirements regarding waivers of constitutional rights. Thus, regardless of whether the statute prevents the attachment of fundamental rights (as

construed by the majority) or presumes the waiver of those rights (as construed by Judge Caplinger), it violates constitutional principles just the same.

The Kansas court's decision conflicts sharply with the only other state court decisions analyzing due process claims under similar circumstances. In those cases, the courts concluded that the government may not absolutely bar a biological father's efforts to assert his parental rights. *See McIntyre*, 780 P.2d at 245 ("*Lehr* indicates . . . that, under the Due Process Clause, a state may not place an absolute bar to a biological father's efforts to assert the rights and responsibilities of fatherhood."); *C.O.*, 639 N.E.2d at 525 ("A statute which absolutely extinguishes a father's efforts to assert the rights and responsibilities of being a father . . . runs contrary to due process safeguards."). The Kansas court likewise recognized the unconstitutionality of an absolute bar to paternity, *see* App. at 36 ("[A] state may not absolutely bar a biological parent from asserting parental rights"), but reasoned that Section 38-1114(f) does not amount to an "absolute bar" because it permits a father to "protect his parental rights by insisting on a written agreement." App. at 36. This purported distinction between an "absolute bar" and a "presumed bar" is of no constitutional significance.

The "default" position under Section 38-1114(f) strips parental rights from a biological father of a child conceived by artificial insemination and born to an unwed mother. Put differently, the legislative "norm" in Kansas results in the deprivation of a

fundamental right. The default position will govern in most cases. Most acquaintances who enter into artificial insemination arrangements will, as in this case, be unaware of Section 38-1114(f), unaware of the statutorily imposed writing requirement, and thus permanently stuck with the legislative "norm."

Mandating this default position would amount to an absolute bar against a father's parental rights, and every court that has addressed these issues, including the Kansas Supreme Court, has acknowledged that an absolute bar violates constitutional principles. Permitting a narrow means by which a father can opt-out of the legislative "norm" does not change the constitutional outcome. The government cannot preserve an otherwise-unconstitutional statute by permitting parties a narrow avenue by which to avoid the presumed constitutional violation.

Imagine, for example, a statute prohibiting a grandmother from living with her extended family (*e.g.*, son and grandson), unless the grandmother and landlord agreed in writing to that arrangement. *Cf. Moore v. City of East Cleveland, Ohio*, 431 U.S. 494 (1977) (involving a variation of those facts). Or further envision a statute compelling the sterilization of a convicted felon, unless he and his spouse objected in writing. *Cf. Skinner v. State of Okla. ex. rel. Williamson*, 316 U.S. 535 (1942) (involving a variation of those facts). These hypothetical statutes—which presumptively deprive citizens of their substantive due process rights—would not pass constitutional muster under this

Court's precedent. Likewise, the Kansas legislature cannot enact a paternity-barring statute that permits a father, through affirmative action, to preserve the constitutionally protected rights that the legislature has presumed away. By setting the statutory default to deprive fathers of their parental rights, Section 38-1114(f) violates constitutional principles.

In enacting Section 38-1114(f), the legislature sought to enhance the "predictability, clarity, and enforceability" of paternal rights for those participating in an out-of-wedlock artificial insemination. App. at 33. Notwithstanding the debatable importance of this governmental interest, the State of Kansas acted unconstitutionally in seeking to achieve it. In short, Kansas created the wrong legislative presumption. The Kansas statute must presume, at least in the context of an out-of-wedlock artificial insemination, that both biological parents retain their parental rights. Having created the proper presumption—one in favor of fundamental rights—the state can then employ varying schemes to enhance the clarity of parental rights. For example, the state may permit the father to waive his parental rights in writing, or alternatively, the state may require that both the mother and father express their parenting intentions, whatever those might be, in writing. These are acceptable means by which the state may further its interest in clarity, but it is abundantly clear that the state may not seek this clarity by creating a presumption against fundamental rights.

II. The Kansas Paternity-Barring Statute Violates Petitioner's Procedural Due Process Rights.

Procedural due process requires "the opportunity to be heard . . . at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (quotations omitted). Procedural due process rights apply only where the government deprives individuals of either a "liberty" or "property" interest. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). Section 38-1114(f) has deprived Petitioner of his fundamental liberty interest in parenting his biological children. *See Troxel*, 530 U.S. at 65; *Stanley v. Illinois*, 405 U.S. 645, 651-52 (1972). Thus, the requirements of procedural due process must be satisfied.

In *Stanley*, 405 U.S. at 649, this Court found a procedural due process violation where an Illinois statute stripped an unwed father of his parental rights following the death of his children's mother. That statute was premised on the overbroad assumption that unwed fathers are presumptively unfit parents. A procedural due process violation occurred because the state presumed the very basis of the statutory scheme (*i.e.*, the father's fitness as a parent) and did not provide the father with a meaningful opportunity to rebut that presumption. *Id.* at 653. This Court reasoned that the state "register[ed] no gain towards its declared goals" of protecting children from unfit parents where the legislature's presumption proved to be incorrect and

the authorities removed a child from his fit, biological father. *Id.* at 652.

Similarly, under Section 38-1114(f), a biological father of a child conceived via artificial insemination has no "meaningful opportunity to be heard" regarding his parental rights unless he first entered into a written agreement with the unwed mother. The Kansas legislature based Section 38-1114(f) on the incorrect assumption that sperm-donating fathers do not want to parent their children. *See* App. at 37. Much like the unconstitutional statute in *Stanley*, Section 38-1114(f) deprives a biological father of his parental rights without a meaningful opportunity to be heard on the very factor underlying the statutory scheme (*i.e.*, the father's willingness to accept the rights and responsibilities of fatherhood). In fact, in situations like this, where a willing and able biological father agrees with the mother to act as father for the children, "the State spites its own articulated goals when it needlessly separates him from his [children]." *See Stanley*, 405 U.S. at 652-53. Resting a law on this sort of overbroad presumption, and thereby depriving biological fathers of a meaningful opportunity to be heard, offends this Court's procedural due process jurisprudence. *See id.*

III. The Kansas Paternity-Barring Statute Violates Petitioner's Equal Protection Rights By Arbitrarily Treating Him Less Favorably Than Similarly Situated Mothers.

Unwed biological mothers of children conceived by artificial insemination are treated more favorably than unwed biological fathers of children conceived by artificial insemination. Unwed mothers are presumed to retain their parental rights; whereas unwed fathers are presumed to forfeit them. Section 38-1114(f) further widens the sex-based inequality by placing the father's ability to rebut the presumption outside his own power and hinging it upon the mother's willingness to enter into a written agreement.

"[E]qual protection analysis requires strict scrutiny of a legislative classification . . . when the classification impermissibly interferes with the exercise of a fundamental right[.]" *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312 (1976) (*per curiam* opinion). Here, the classification drawn by Section 38-1114(f) impermissibly interferes with Petitioner's fundamental right to parent his children, and thus strict scrutiny applies. The Kansas court erred by applying intermediate scrutiny, looking only at sex and failing to recognize the fundamental rights at issue. Nevertheless, Section 38.1114(f) fails under either intermediate or strict scrutiny.

"In order to withstand strict scrutiny, the law must advance a compelling state interest by the least restrictive means available." *Bernal v. Fainter*,

467 U.S. 216, 219 (1984). The Kansas court acknowledged four governmental interests underlying Section 38-1114(f), none of which is compelling. Furthermore, even if the state's interests were compelling, Section 38-1114(f) is neither narrowly drawn, nor the least restrictive means of achieving those ends.

The first three governmental interests—(1) permitting unmarried women to become parents without sexual intercourse, (2) encouraging men to donate sperm, and (3) protecting unmarried women from unwanted paternity claims—are best grouped together because they all further the overarching goal of encouraging unwed men and women to participate in artificial insemination. These stated governmental interests focus on (1) the state's interest in ensuring the existence of the next generation and (2) the rights of adult participants in artificial insemination. Yet, the government ignores the rights and interests of the artificially conceived children—children whose interests are arguably greater those of the participating adults.

The government has an understandable interest in ensuring the existence of the next generation and the continuation of the human race. But the government cannot claim a compelling interest in any particular form of procreation unless it is demonstrated that other forms are failing. In 2004, a mere 1% of the babies born in the United States were conceived through various means of assisted reproductive technologies (which includes artificial insemination); whereas, 99% of babies born in that

year were conceived by sexual intercourse. *See Assisted Reproductive Technology Surveillance – United States 2004*, CENTER FOR DISEASE CONTROL, *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/ss5606a1.htm?s_cid=ss5606a1_e. Given these statistics, the government cannot demonstrate a compelling interest in promoting artificial insemination at the expense of a biological father's constitutional rights.

Moreover, encouraging unwed persons—especially unwed fathers who do not want to participate in their children's lives—to conceive children by artificial insemination is not a compelling state interest. Section 38-1114(f) promotes the *intentional* creation of single-parent families; it encourages unwed mothers to raise children without the involvement of their biological fathers; and it encourages unwed sperm-donating fathers to forfeit any involvement in their biological children's lives. These governmental interests conflict with the wealth of empirical evidence showing that children benefit from a father's involvement in their lives. *See, e.g.*, Anna Sarkadi et al., *Fathers' involvement and children's developmental outcomes: a systematic review of longitudinal studies*, ACTA PAEDIATRICA 97(2), 153-58 (2008). Encouraging the creation of single-parent families also imposes exorbitant costs on Kansas taxpayers. *See* Benjamin Scafidi, *The Taxpayer Costs of Divorce and Unwed Childbearing*, INSTITUTE FOR AMERICAN VALUES (2008) (estimating that divorce and unwed childbearing costs "taxpayers at least $112 billion each and every year," including

$389 million in the State of Kansas alone). Thus, this first set of governmental interests is not compelling; indeed it could be argued that those interests are not even legitimate.

The next asserted governmental purpose seeks to enhance the "predictability, clarity, and enforceability" of paternity claims by sperm-donating fathers. App. at 33. This Court has previously acknowledged that the government's interest in minimizing the "lurking problems" of paternity claims is insufficient to "shield otherwise invidious discrimination." *See Gomez v. Perez*, 409 U.S. 535, 538 (1973). Moreover, Section 38-1114(f) is not a narrowly tailored means of achieving that interest. The state can use other means to ensure clarity of parental rights and obligations—means that do not infringe on a father's parental rights, or draw arbitrary distinctions between men and women. The state can, for example, enact a statute requiring all participants involved in a medically supervised artificial insemination procedure to express in writing their intentions regarding parental rights. Such a statute is a much-preferred, constitutional alternative to Section 38-1114(f); it achieves the state's purpose of promoting clarity *better* than Section 38-1114(f) (which attempts to presume the parties' intentions from the lack of a writing) while, at the same time, eliminating the constitutional problems created by Section 38-1114(f).

The Kansas court mentioned one more governmental interest in its decision: "to prevent

the creation of parental status where it is not desired or expected." App. at 37. In seeking to accomplish this end, the state has swept much too broadly. Perhaps Section 38-1114(f) "realizes the expectation of unknown or anonymous sperm donors," App. at 37, but it does not encapsulate the expectations of every participant in an artificial insemination arrangement. This Court need look no further than Petitioner's situation to see that Section 38-1114(f) is grossly overinclusive—that is, it includes sperm-donating fathers who want to retain their parental rights. Such an overinclusive statute violates equal protection. *See Jimenez v. Weinberger*, 417 U.S. 628, 636-37 (1974) (finding an equal protection violation where the statutory distinction was both overinclusive and underinclusive). Consequently, Section 38-1114(f) does not satisfy strict scrutiny.

Neither does Section 38-1114(f) satisfy intermediate scrutiny. *See Clark v. Jeter*, 486 U.S. 456, 461 (1988) (noting that "discriminatory classifications based on sex" are reviewed under "intermediate scrutiny"). To withstand judicial scrutiny under that standard of review, "[g]ender-based distinctions must serve important governmental objectives and must be substantially related to achievement of those objectives." *Caban v. Mohammed*, 441 U.S. 380, 388 (1979) (quotations omitted).

Of all the above-stated governmental interests, the most relevant interest for treating unmarried men differently from unmarried women is to encourage both sexes' participation in artificial

insemination by "prevent[ing] the creation of parental status where it is not desired or expected." App. at 37. This governmental purpose rests on general assumptions regarding the anticipated involvement of the biological father in the life of a child conceived by artificial insemination. The legislature incorrectly assumed that neither the unwed father nor the unwed mother want the father to exercise his parental rights to the conceived child. The legislature seemingly embraced a stereotypical mindset, envisioning a group of committed, proactive mothers, and giving their rights precedence over what the legislature erroneously visualized as a group of unattached, sperm-donating men. Sex-based distinctions premised on such "overbroad generalizations [cannot] be tolerated under the Constitution." *Weinberger*, 420 U.S. at 643.

An equal protection violation occurs where the government bases a sex-based distinction on "a natural parental interest shared by both genders alike," rather than a "profound difference between . . . mothers and fathers[.]" *Caban*, 441 U.S at 391-92. Here, the sex-based distinction is based on a parent's presumed desire to be involved in his or her biological child's life. This desire for a relationship with one's child is not based on any "profound difference" between the sexes but, instead, is grounded on the desire of nearly all parents, both male and female, to be involved in the lives of their children. The father, like the mother, is an indispensable contributor to the child's genetic makeup, and possesses a parental interest of equal importance to the mother's. The State of Kansas

violated constitutional principles by treating these similarly situated parents differently.

This Court should thus, as it did in *Caban*, strike down this sex-based distinction because it excludes fathers from participating in their children's lives and simultaneously enables mothers to cut off paternal rights arbitrarily. *See Caban*, 441 U.S. at 394 (declaring that the unconstitutional state law "both exclude[d] some loving fathers from full participation in the decision whether their children will be adopted and, at the same time, enable[d] some alienated mothers arbitrarily to cut off the paternal rights of fathers").[7] This Court cannot condone such blatant sex-based inequality.[8]

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[7] A father's ability to resurrect his presumptively dead parental rights with a written agreement does not affect the constitutional analysis. This Court found similar sex-based inequality to be unconstitutional in *Frontiero v. Richardson*, 411 U.S. 677 (1973), even though the disadvantaged sex was permitted to rebut the statutory presumption erected against her.

[8] In addition, Kansas law violates Petitioner's equal protection rights in another way: by treating him less favorably than biological fathers whose children were conceived by sexual intercourse (rather than artificial insemination) with an unwed woman. Unwed biological fathers whose children are conceived by artificial insemination are presumed to have no parental rights, *see* KAN. STAT. ANN. § 38-1114(f); whereas, unwed biological fathers whose children are conceived by sexual intercourse are presumed to have parental rights and forced to accept their parental responsibilities, *see* KAN. STAT. ANN. § 38-1114(a)(4); KAN. STAT. ANN. § 38-1114(a)(5). Strict scrutiny should apply because this arbitrary distinction infringes a fundamental right. But no matter what standard of review applies, this distinction violates equal protection because it is wholly irrational. Men who conceive children while engaging

IV. The Kansas Paternity-Barring Statute Violates Petitioner's Children's Equal Protection Rights By Arbitrarily Treating Them Less Favorably Than Similarly Situated Children.

Section 38-1114(f) presumes that a child conceived by artificial insemination and born to an unwed mother will not have a legal relationship with his biological father. In contrast, other Kansas statutes presume that a child conceived by sexual intercourse and born to an unwed mother will have a legal relationship with his biological father. *See* KAN. STAT. ANN. § 38-1114(a)(5). Barring a child's legal relationship with his biological father deprives the child of substantial benefits, both relational and financial, provided by the father. These substantial benefits include, to name a few, intestacy and inheritance rights, social security benefits, and child-support contributions.[9]

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in sexual intercourse with unwed mothers often do not intend to conceive the child and, as a result, are unwilling or unable to fill the paternal role. In contrast, men who have agreed to donate their sperm to a friend or acquaintance have knowingly intended to conceive the child and often plan to parent that child with the mother. Presumptively denying the paternity of an intentional, willing father—while readily imposing paternity on an unintended, unwilling father—is a statutory design of such absurdity as to violate equal protection.

[9] Given that this case comes to this Court as an appeal from a state court paternity action, and that Petitioner filed his suit as "next friend" of his children, this Court is authorized to consider the constitutional interests of the children. This Court has repeatedly recognized that the "interest primarily at stake in [a] paternity action [is] that of the child," *Pickett v. Brown*, 462 U.S. 1, 16 n.15 (1983) (alterations in original); *see also*

This Court's equal protection jurisprudence has long prohibited the government from imposing arbitrary legal disabilities against illegitimate children. *See Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175-76 (1972); *Gomez*, 409 U.S. at 538; *Trimble v. Gordon*, 430 U.S. 762, 769 (1977); *Clark*, 486 U.S. at 461. "[A] State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally." *Gomez*, 409 U.S. at 538. Children are not responsible for the circumstances of their birth; thus imposing arbitrary legal disabilities because of birth status "is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing." *Weber*, 406 U.S. at 175-76. Treating one subclass of children differently from another simply because of their parents' actions in bringing about their conception is both "illogical and unjust." *Clark*, 486 U.S. at 461. Section 38-1114(f) blatantly violates this Court's precedent by *reinstituting the historical disabilities of illegitimate children. See Gomez*, 409 U.S. at 538.

"[T]o conclusively deny one subclass benefits presumptively available to the other denies the former the equal protection of the laws[.]" *Jimenez*, 417 U.S. at 636-37. The Kansas statute denies a subclass of children—those conceived by an unmarried mother through artificial insemination—the benefits of a legal relationship with their

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Little, 452 U.S. at 13, and "it is the child who has an interest in establishing a relationship to his father," *Pickett*, 462 U.S. at 16 n.15.

biological father. In contrast, all children conceived by an unmarried mother through sexual intercourse are presumptively afforded those benefits. These inverse presumptions result in a stark difference between the benefits afforded to children conceived by artificial insemination and those afforded to children conceived by sexual intercourse. For example, Petitioner's children are *barred* from a legal relationship with their biological father, even though he is imploring the judicial system to afford his children that benefit. On the other hand, if Petitioner and Respondent had conceived their children through sexual intercourse, the state would *force* Petitioner to provide certain parental obligations, even if he pleaded with the judicial system to be relieved of those duties. Simply put, the state is actively fighting for the parental support of illegitimate children conceived by sexual intercourse, but fighting against the parental support of children conceived by artificial insemination.

The results of this unequal treatment are particularly pernicious in this case. Respondent is unmarried; thus the children do not have a father in their lives. Petitioner is the known sperm donor; thus the parties and the courts know the identity of the children's biological father. Most importantly, Petitioner deeply desires a relationship with his children and wants to provide the financial and relational support they need from their father. Section 38-1114(f) has precluded the children from this readily available and severely needed paternal support. If, however, the twins had been conceived

by sexual intercourse, they would not face this unfair legal disadvantage. Kansas law cannot impose such arbitrary, unequal treatment on innocent children.

This Court's equal protection cases involving illegitimate children have routinely applied intermediate scrutiny, requiring that the unequal statutory treatment be substantially related to an important governmental interest. *See Clark*, 486 U.S. at 461. The primary governmental interests underlying Section 38-1114(f) inexplicably seek to encourage unwed adults to engage in artificial insemination. These interests, above all, attempt to influence the conduct of adults. But this Court has "expressly considered and rejected the argument that a State may attempt to influence the actions of men and women by imposing sanctions on the children born of their . . . relationships." *See Trimble*, 430 U.S. at 769. The remaining governmental interests at issue here seek to enhance the "predictability, clarity, and enforceability" of paternity claims. But, again, this Court has repeatedly rejected the idea that the government's desire to avoid the "lurking problems" of paternity claims can "shield otherwise invidious discrimination." *See Gomez*, 409 U.S. at 538. Section 38-1114(f) does not withstand judicial scrutiny, and thus violates the children's equal protection rights.

CONCLUSION

Amicus respectfully requests that this Court grant Petitioner's request for a writ of *certiorari*.

Respectfully submitted,

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In The

Supreme Court of the United States

DARYL HENDRIX,

Petitioner,

v.

SAMANTHA HARRINGTON,

Respondent.

On Petition For Writ Of *Certiorari* To The Supreme Court Of The State Of Kansas

BRIEF *AMICUS CURIAE* OF KEYS FOR NETWORKING, INC. AND MILFRED DALE, PH.D. IN SUPPORT OF THE PETITIONER

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Established in 1987, Keys for Networking, Inc. (Keys) is the state-wide Kansas organization for the National Federation of Families for Children's Mental Health and serves hundreds of children and families each year. Keys' mission is to mobilize services and support for at-risk children and families through advocacy, education, systems change, and training.

Milfred Dale, Ph.D. is a licensed psychologist in Topeka, Kansas, and a law student at Washburn University School of Law in Topeka, Kansas. He has treated children and families for more than twenty years and specializes in work with children and families of divorce as well as therapy with teenage and young adult men. He was a student participant in an *Amicus Curiae* brief submitted to the Kansas Supreme Court in this case by Professor Linda Elrod and the Children and Family Law Center of Washburn University School of Law.

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[1] Counsel of record for both the Petitioner and the Respondent received notice of the *Amici's* intention to file this brief at least ten days prior to the Court's due date for the Respondent's Response (May 28, 2008). Counsel for both parties consented to this *Amicus Curiae* brief.

Neither party's counsel authored this brief in whole or in part, and neither counsel for a party, nor the parties themselves, monetarily contributed to the preparation or submission of this brief. No person other than *Amici* made any monetary contribution to the submission of this brief.

When public policy issues directly impact the quality of children's lives and place them at risk, Keys and Dale advocate that the best interests of children must be balanced and appropriately weighed in legal and legislative decision making. In seeking to promote the welfare of children and families, Keys and Dale respectfully submit this brief as *Amici Curiae*.

STATEMENT OF THE ISSUE

Whether the due process and equal protection clauses of the Fourteenth Amendment apply to protect the parent-child relationships of children born via artificial insemination and are violated when K.S.A. §38-1114(f) allows parents to bargain away the child's rights to paternity, support, and other legal benefits from their father.

SUMMARY OF ARGUMENT

K.S.A. §38-1114(f) is unconstitutional because it denies children due process and equal protection safeguards for both their parent-child relationships as well as for the support of their mother *and* father. K.M.H. and K.C.H. were born through use of artificial insemination, yet they and subsequent children born via artificial insemination are no different from children conceived naturally through heterosexual

means. All children, regardless of mode of conception or jurisdiction of birth, are entitled to due process and equal protection for their rights to paternity and the benefits thereof. Because children are not responsible for the circumstances of their births, they cannot be discriminated against on this basis. The due process and equal protection clauses of the Fourteenth Amendment preserve for children, to the maximum extent possible, the benefits of two parent-child relationships, the rights to emotional and financial support from two parents, and the benefits of two lines of heritage (e.g., family bonds, inheritance, etc.). These benefits stabilize families, serve the best interests of children, and serve the state's interests in holding those parents responsible for the birth of children accountable for these children's care.

The *Amici* assert that the two children born as a result of the parent's conduct in this case have constitutional interests in their parent-child relationships that have been ignored by the court below. In his dissent, Judge Hill agreed:

> I too agree that as applied in this case, K.S.A. 38-1114(f) is unconstitutional when applied to a known donor. . . . But I raise my hand and ask a different question. Who speaks for the children in these proceedings? As applied by the majority in this case, this generative statute of frauds slices away half of their heritage. . . . None of the elaborate and meticulous safeguards our Kansas laws afford parents *and children* in proceedings

> before our courts when confronted with questions of parentage have been extended to these children. A quick glance over our procedures dealing with the Kansas Parentage Act (K.S.A. 38-1110 *et seq.*) or our Code for Care of Children (K.S.A. 38-1501 *et seq.*) reveals the great caution we take in this state when courts must consider such relationships. While it is true that an attorney was appointed to represent the children in the original child in need of care case, the record from their point of view remains silent. *In re K.M.H.*, 169 P.3d 1025, 1051 (Kan. 2007) (Hill, J., dissent).

The purpose of this *Amicus Curiae* brief is to speak for these two children and other potential children similarly situated whose needs and rights are similarly ignored. In this case, K.M.H. and K.C.H. were denied the legal protections for their relationship with their father that are afforded to all other children. These denials constitute violations of the due process and equal protection safeguards to which children are entitled under the Fourteenth Amendment of the Constitution as established by this Court. This case presents the Court with a much-needed opportunity to require that parent participants of artificial insemination follow the Constitution so as to best provide for the children conceived in this way.

ARGUMENT AND AUTHORITIES

I. Children possess important substantive (and perhaps even fundamental) liberty interests in their parent-child relationships and these rights are deserving of the protections of the Due Process Clause of the Fourteenth Amendment.

Analysis of the children's substantive and procedural due process claims requires first a determination of the protected liberty or property interests involved (the children's substantive rights), then a second determination of the nature and the extent of the process due. The basic elements of due process are notice and an opportunity to be heard at a meaningful time and in a meaningful manner. *Armstrong v. Manzo*, 380 U.S. 545, 85 S.Ct. 1187, 14 L.Ed. 2d 62 (1965). The liberty interests that K.M.H. and K.C.H. and similarly situated children have in their parentage are deserving of due process protections and cannot be terminated without notice or an opportunity to be heard.

A. Children are rights holders whose most important and fundamental substantive rights involve establishing, to the maximum extent possible, their parent-child relationships with both parents.

Children are substantive rights holders under the United States Constitution. This Court has repeatedly held that children have constitutionally protected interests and are persons within the Bill of

Rights. *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed. 2d 15 (1972). The most important and most fundamental of children's rights are their rights to parent-child relationships with, and to support from, both parents. While this Court has characterized parents' rights to the parent-child relationship as fundamental liberty interests, children's interests in these same relationships might also be characterized as fundamental. *See Troxel v. Granville*, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed. 2d 49 (2000). For example, in *Troxel*, Justice Stevens noted the need to balance children's interests in these same intimate relationships:

> . . . it seems to me extremely likely that, to the extent that parents and families have fundamental liberty interests in preserving such intimate relationships, so too, do children have these interests, and so, too, must their interests be balanced in the equation. *Id.* at 89, at 2072, at 71.

Other federal and state courts have identified children's interests in parent-child relationships as fundamental liberty interests. For example, a federal court found that children have fundamental liberty interests in parent-child relationships in deprivation or termination of parental rights proceedings. *Kenny A. v. Perdue*, 356 F.Supp. 2d 1353 (N.D. Ga. 2005). The court noted "a child's interest in his or her own safety, health, and well-being, as well as an interest in maintaining the integrity of the family unit and in

having a relationship with his or her biological parents." *Id.* at 1359-60.

Similarly, in a case involving inheritance rights, the Kansas Court of Appeals held:

> **It is inconceivable to us that a child would not have a due process right in the determination of his or her parentage**. . . . The rights and interests of a child in his or her parentage are due process rights which cannot be terminated or affected without notice and an opportunity to be heard. . . . the cases have been unanimous in concluding that a parent has a fundamental liberty interest in maintaining a familial relationship with a child. [citations omitted]. By the same token, **we hold that a child has that same fundamental interest in his or her parentage**. [emphasis added]. *Ferguson v. Winston*, 27 Kan. App. 2d 34, 39, 996 P.2d 841, 846 (2000).

B. Substantive rights of Kansas children born via artificial insemination are not protected when "[t]he elaborate and meticulous safeguards" of Kansas law are not extended to them so as to provide for "predictability, clarity, and enforceability" of the parental rights of mothers unwilling to file for paternity on behalf of her children and fathers who are unwilling to provide emotional and financial support for their children.

K.M.H. and K.C.H. received none of the protections of traditional paternity law in Kansas that are afforded to all other Kansas children. In Kansas, children are independent parties in paternity actions. K.S.A. §38-1115(a). Kansas children, or someone on behalf of a Kansas child, can bring an action to determine the existence of a father and a child relationship at any time until three years after reaching the age of majority. K.S.A. §38-1115(a)(1)-(2). In addition, children in Kansas have a legal right to child support and a right to paternity. *Lawrence v. Boyd*, 207 Kan. 776, 778-79, 486 P.2d 1394, 1397 (1971). As interpreted by the court below, K.S.A. §38-1114(f) extinguishes the child's right to paternity and support, and also eliminates the child's right to assert this right through the age of twenty-one. Traditionally, these are not rights that can be "bargained away or defeated by a purported settlement between the father and the mother." *Id.* at 779, 486 P.2d at 1397; *see Thompson v. Thompson*, 205 Kan. 630, 633, 470 P.2d 787, 790 (1970). In two separate cases in 1881 that

are still considered good precedent, the Kansas Supreme Court was among the first to recognize that children should not be treated as chattel or property in matters of parental care and custody.

> [A] child is not in any sense like a horse or any other chattel, subject-matter for absolute and irrevocable gift or contract. The father cannot, by merely giving away his child, release himself from the obligations to support it, nor be deprived of its right to custody. In this it differs from the gift or any article which is only property.

Chapsky v. Wood, 26 Kan. 650, 40 Am. Rep. 321 (1881); *see also In re Bort*, 25 Kan. 308, 37 Am. Rep. 255 (1881).

In addition, in the context of traditional paternity law, the rights of the minor to child support cannot be waived by inaction or passive acquiescence on the part of the mother, nor may a father deny his obligations or invoke a defense of laches as a bar to enforcement of moral and legal obligations to minor children. *Strecker v. Wilkinson*, 220 Kan. 292, 552 P.2d 979 (1976). *See also Peters v. Weber*, 175 Kan. 838, 267 P.2d 481 (1954). Traditional Kansas paternity law also supports maximizing children's opportunities to their fathers by allowing a man to notoriously or in writing acknowledge his paternity, and to require rebuttal only by either clear and convincing evidence of non-paternity or a court decree establishing paternity in another man. *In the Matter of the Parentage of Shade*, 34 Kan. App. 2d 895, 126

P.3d 445 (2006). And finally, K.S.A. §21-3605 criminalizes non-support of a child, regardless of whether the child is born to a married or unmarried woman.

The Kansas Supreme Court had also previously noted that "termination of parental rights is an extremely serious matter and may only be accomplished in a manner which assures maximum protection to all of the rights of the natural parents and of the child involved." *In the Interest of A.W.*, 241 Kan. 810, 814, 740 P.2d 82, 86 (1987). The Kansas Supreme Court had also previously held that it is correct to construe the Kansas Parentage Act to recognize that "every child has an interest not only in obtaining support, but also in inheritance rights, family bonds, and accurate identification in his parentage." *In re Marriage of Ross*, 245 Kan. 591, 597, 783 P.2d 331, 336 (1989).

If the decision of the court below stands, all Kansas children, except those like K.M.H. and K.C.H. born via artificial insemination, will continue to enjoy these protections. What were once the problems to which paternity law applied (e.g., namely, mothers unwilling to file for paternity on behalf of her children and fathers unwilling to provide emotional and financial support for their children), are dubiously recast as important or legitimate state interests. This is inconsistent with the children's constitutional rights as well as the state's *parens patriae* obligations to protect children.

C. Children's rights must be considered separate from parental rights, particularly when the children's interests and the interests of their parents are not aligned.

Children's rights need legal protection when their interests and those of their parents are not aligned. Although this by definition calls for court assignment of a guardian ad litem (GAL), the GAL stood silent throughout this case, at least in part because, when the court denied the father standing, it appeared that this in effect denied the children an "interested party" through which to place their interests before the court.

But parents do not possess absolute and unreviewable discretion with respect to their children. *Parham v. J.R.*, 442 U.S. 584, 99 S.Ct. 2493, L.Ed. 2d 101 (1979) (holding that consideration of a child's right limits parents from exercising absolute and unreviewable discretion). The Constitution's protections for parents' fundamental liberty interests in the care, custody, and control of their children carry great weight, but the Supreme Court has never held that the parents' interests should act as a rigid constitutional shield, protecting every arbitrary parental decision from challenge. *Troxel*, 530 U.S. at 88, 120 S.Ct. at 2072.

In cases involving children, children's interests and rights must be placed before the court by an advocate on their behalf. Linda D. Elrod, *Client-Directed*

Lawyers for Children: It is the "Right" Thing to Do, 27(4) Pace Law Review 101 (2007). The guardian ad litem's task is to represent the child's interests and rights, a task that may or may not include deference to the rights of the parents. Quite simply, the Constitution does not allow a fit mother the right to deny her child access to a fit father. *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed. 2d 551 (1972); *see also In re Hood*, 930 S.W.2d 575 (Tenn. Ct. App. 1996) (citing Supreme Court cases establishing parental rights as fundamental liberty interests in overturning a statute that prohibited the father from executing a voluntary acknowledgement of paternity without the consent of the mother); *In re Adoption of Kelsey S.*, 823 P.2d 1216 (Cal. 1992) (striking down as unconstitutional a statutory scheme that allowed a mother to preclude a father from achieving a status necessary for him to gain custody of his child); *In the Matter of Raquel Marie X.*, 559 N.E.2d 418 (1990) (holding a father's rights cannot be conditioned upon a statutory requirement that he live with the child's mother continuously for six months). The *Amici* view this brief and its outline of the rights of children as particularly important given the absence of the children's perspective in the record of this case.

D. Children's procedural due process rights to paternity are violated when a state action allows parents to barter away many of the children's substantive rights before the child is born, in effect providing children absolutely no opportunity to establish their paternity.

Children's due process guarantees are violated by K.S.A. §38-1114(f) in this case when the statute allows parents to contract away the children's rights to support. The children's constitutional interests in parent-child relationships and support from both parents must be afforded adequate procedural due process. Justice Rehnquist succinctly articulated what is proposed as the children's due process argument for the Court in *Mills v. Habluetzel*, 456 U.S. 91, 102 S.Ct. 1549, 71 L.Ed. 2d 770 (1982) (deciding on equal protection grounds that illegitimate children and legitimate children must have the same opportunities to obtain parental support and not reaching the due process issue, but using procedural due process language):

> A state that grants opportunity for legitimate children to obtain parental support must also grant that opportunity to illegitimate children, and this opportunity must be more than illusory. *Id.* at 91, at 1550.

Children born via artificial insemination to unmarried parents are in a precarious position. Their interests may not be congruent with those of either parent. When a mother is unwilling to file a paternity

action on behalf of her child to exercise the child's rights to his or her second parent, the mother's and the child's interests are no longer congruent. *Id.* Similarly, this Court has also held that a putative father "has no legitimate [protectable] right and certainly no liberty interest in avoiding financial obligations to his natural child that are imposed by state law." *Rivera v. Minnich*, 483 U.S. 574, 107 S.Ct. 3001, 97 L.Ed. 2d 473 (1987). Whereas the father in the present case wishes to establish paternity and to meet his parental duties and obligations to the children, the rights of future children born via artificial insemination will be ignored if the decision of the court below is affirmed.

II. The Equal Protection Clause of the Fourteenth Amendment applies to children born to unmarried parents via artificial insemination, who are no different from all other children and must be afforded the benefits to paternity enjoyed by all other children.

A. By preventing K.M.H. and K.C.H. from enjoying the benefits of paternity that are afforded to all other children, including children of artificial insemination born to married parents, the court below violated the children's rights to Equal Protection.

In 1973, this Court established children's rights to support from their fathers in addition to that received from their mothers, ending once and for all the legal distinctions between the rights of legitimate

and illegitimate children. *Gomez v. Perez*, 409 U.S. 535, 93 S.Ct. 872, 35 L.Ed. 2d 56 (1973). The *Gomez* Court established that there was "no constitutionally sufficient justification" for denying illegitimate children support from their fathers when the state assured legitimate children this support. *Id.* at 538, at 875, at 56. The Court found that children's equal protection rights under the Fourteenth Amendment were violated by such "illogical" and "unjust" distinctions. *Id.* Since the *Gomez* holding protects children whose parents have never married, it should also protect children of artificial insemination whose parents have never married.

Similarly, this Court has also found that, because children were not responsible for the circumstances of their births, discrimination because of the circumstances of their births violated the Equal Protection Clause of the Fourteenth Amendment. *Weber v. Aetna Cas. & Surety Co.*, 406 U.S. 164, 92 S.Ct. 1400, 31 L.Ed. 2d 768 (1972). Children are children. Children born via artificial insemination to unmarried parents are no different from children born via artificial insemination to married parents or to children conceived naturally by heterosexual means. Denying K.M.H. and K.C.H. their rights to support from their father violates the children's equal protection rights as established in *Gomez* and *Weber*.

In addition, in two unanimous decisions, this Court extended the above equal protection rights to paternity cases and established that the child is an independent party in paternity proceedings whose rights to determine the existence of a father-child

relationship cannot be unreasonably limited by state action. *Clark v. Jeter*, 486 U.S. 456, 108 S.Ct. 1910, 100 L.Ed. 2d 465 (1988); *Pickett v. Brown*, 461 U.S. 1, 103 S.Ct. 2199, 76 L.Ed. 2d 372 (1983). In *Clark*, Justice O'Connor wrote for the Court that, while legitimate children may seek support from their parents at any time until the age of majority, a six-year statute of limitations imposed by the state (Pennsylvania) on illegitimate children:

> . . . violates the Equal Protection Clause [of the Fourteenth Amendment]. Under the heightened scrutiny analysis used in evaluating equal protection challenges to statutes of limitations that apply to illegitimate children's paternity suits, the period for obtaining support must be sufficiently long to present a reasonable opportunity for those with an interest in illegitimate children to assert claims on their behalf, and any time limitation placed on that opportunity must be substantially related to the State's interest in avoiding the litigation of stale or fraudulent claims. *Clark*, at 456-7.

While the *Clark* Court found the state statute to be unconstitutional on equal protection grounds and did not reach the due process issues, the implications for children's due process rights were clearly stated, "any time limitation on that opportunity must be substantially related to the State's interest in avoiding litigation of stale or fraudulent claims." *Id.*

The harm from failure to establish paternity is not inconsequential. Once paternity is established, children of unmarried parents can obtain numerous benefits through their father: wrongful death benefits upon the death of a parent, *Levy v. Louisiana*, 391 U.S. 68, 88 S.Ct. 1509, 20 L.Ed. 2d 436 (1968); social security benefits upon the death or disability of a parent, *Griffin v. Richardson*, 409 U.S. 1069, 92 S.Ct. 689, 34 L.Ed. 2d 660 (1972); and, inheriting by intestate succession from both their mothers and fathers, *Trimble v. Gordon*, 430 U.S. 762, 97 S.Ct. 1459, 52 L.Ed. 2d 31 (1977). By denying the children the opportunity to establish paternity, the decision below unconstitutionally denies K.M.H. and K.C.H. as well as future children born via artificial insemination to unmarried parents these important benefits.

B. State courts have begun to extend equal protection under the Fourteenth Amendment to children of artificial insemination (and other assisted reproductive technologies).

State courts have utilized equal protection principles to establish the paternity of children born via artificial means to unmarried parents. For example, the Washington Supreme Court assigned legal parentage to the biological father of two children born using in vitro fertilization after he claimed his consent to the inseminations should be invalid because they were not written down as required by statute. *In the Matter of the Parentage of J.M.K. and D.R.K.*, 119

P.3d 840 (Wash. 2005) (citing *Gomez* and *Weber* as equal protection precedents). The Washington court noted that the purpose of the Washington Parentage Act was "to encourage parental responsibility for married and unmarried parents" and that the "Act's purpose is to give full equality to all children by recognizing their right to parental support and their legal relationship with both parents." *Id.* at 848. The Kansas Parentage Act is no different in its intent.

In addition, the Illinois Supreme Court has also established paternity in a father sperm donor based upon the state's "strong interest in protecting and promoting the welfare of its children" and the court's "duty to ensure that the rights of children are adequately protected." *In the Parentage of M.J.*, 787 N.E.2d 144, 151 (Ill. 2003). The court noted:

> . . . if an unmarried man who biologically causes conception through sexual relations without premeditated intent of birth is legally obligated to support a child, then the equivalent resulting birth of a child caused by deliberate conduct of artificial insemination should receive the same treatment in the eyes of the law. Regardless of the method of conception, a child is born in need of support . . . [T]o hold otherwise would deprive children of financial support. *Id.* at 152.

III. Failing to support to the maximum extent possible children's interests and rights to their fathers and the benefits of established paternity is not only unconstitutional, as a matter of public policy, it is not "wise."

Doing what is best for children in disputes regarding custody and parenting is both a moral objective and a legal task. Robert H. Mnookin, *Child-custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 Law & Contemp. Probs. 226 (1975). Consideration of the best interests of the child has traditionally been made on a case-by-case basis rather than as a class or homogeneous grouping with identical needs and situations. *See also* Joan B. Kelly, *The Best Interests of the Child: A Concept in Search of Meaning*, 35(4) Fam. & Conciliation Cts. Rev. 377 (1997). In *Stanley* this Court established the parental rights and obligations of unwed fathers and noted that,

> [T]he Constitution recognizes higher values than speed and efficiency. [citations omitted] . . . Procedure by presumption is always cheaper and easier than individualized determinations. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand. 405 U.S. at 656-57, at 1215, at 562.

Failing to adequately protect the children's interests and rights to two parents was accurately identified as "not wise" by the majority opinion in the present case. *In re K.M.H.*, 169 P.3d at 1041 (noting that "we cannot close our discussion of the constitutionality of K.S.A. §38-1114(f) without observing that all that is constitutional is not necessarily wise. [emphasis added] We are mindful of, and moved by, the [Washburn University Children and Family Law] Center's advocacy for public policy to maximize the chance of the availability of two parents – and two parents' resources to Kansas children.").

A. Money matters – a statutory scheme that terminates the children's rights to establish paternity and to obtain financial support from their fathers places them at greater risk for numerous problems.

Money matters in the lives of children. This Court has previously held that the state shares the interest of the child and the father in an accurate and just determination of paternity for both economic reasons as well as reasons pertaining to the state's *parens patriae* responsibilities with respect to the child. *Little v. Streater*, 452 U.S. 1, 101 S.Ct. 2202, 68 L.Ed. 2d 627 (1981). Specifically, this Court has previously upheld requirements that mothers did not have good cause for refusing to cooperate with the state's efforts to correctly identify putative fathers under standards taking into account the best

interests of the child. *Maher v. Doe*, 432 U.S. 526, 97 S.Ct. 2474, 53 L.Ed. 2d 534 (1977); *see also Roe v. Norton*, 422 U.S. 391, 95 S.Ct. 2221, 45 L.Ed. 2d 268 (1975). This Court has also defined the state's *parens patriae* interest as in the preservation, not the severance of natural family bonds. *Santosky v. Kramer*, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed. 2d 599 (1982).

A state's interest in holding persons economically responsible for the birth of children they conceived, whether by artificial insemination or natural means, is both constitutionally sound and makes good sense. The enormity of legislative actions, mandates, and policies enforcing the financial obligations of parents to their children defies any kind of detailed description within the space limitations of this brief. States began adopting child support guidelines through legislation, court rule, and administrative action in the 1970s. In 1984, the Child Support Enforcement Act passed by Congress required states to adopt advisory guidelines for judges concerning child support. In 1988, Congress passed the Family Support Act that, *inter alia*, required states to make child support guidelines presumptively binding on courts.

Single unmarried women seek an exception to these mechanisms and ask the state to instead transform their promise to not pursue the semen donor for child support into a form of currency to be used to bargain for semen. This is inconsistent with several legal precedents taking into account the best interests of the child. It is also "not wise" for children.

Money (e.g., child support from fathers) matters. Economic differences between one-parent and two-parent homes have also been empirically connected to differences in the adjustment and well-being of children. Up to fifty percent of the disparities researchers have found in child outcome between one-parent and two-parent families are due to income and economic resource differences. Sara S. McLanahan & Gary Sandefur, GROWING UP WITH A SINGLE PARENT: WHAT HELPS, WHAT HURTS (1994).

The *Amici* concur with the words of Judge Hill in his dissent when he quoted from the Ohio Court of Common Pleas:

> A father's voluntary assumption of fiscal responsibility for his child should be endorsed as a socially responsible action. A statute which absolutely extinguishes a father's efforts to assert the rights and responsibility of being a father, in a case with such facts as those *sub judice*, runs contrary to due process safeguards. [citations omitted]. *In re K.M.H.*, at 1051.

B. The unique, varied, and valuable contributions fathers can make in the lives of their children should not be presumptively denied to children.

Volumes of social science research can be summoned to demonstrate why a statutory scheme that renders children fatherless and limits them to one legal parent is "not wise." Research on father-child

relationships has repeatedly demonstrated the unique, varied, and valuable emotional and psychological contributions fathers can make in the lives of their children.

Cultural and familial ideologies inform the roles fathers play and undoubtedly shape the absolute amounts of time fathers, particularly non-custodial fathers, spend with their children as well as the activities they share with them and the quality of the father-child relationships. Michael E. Lamb & Catherine S. Tamis-Lemonda, *The Role of the Father: An Introduction*, in THE ROLE OF THE FATHER IN CHILD DEVELOPMENT (Michael E. Lamb, ed., 2003). Indeed, the father-ideal has gone through different historical phases, emerging from moral teacher and disciplinarian, through breadwinner and later gender-role model and 'buddy', to the ideal of new nurturing, co-parenting father. Sarkadi et al., *Fathers' Involvement and Children's Developmental Outcomes: A Systematic Review of Longitudinal Studies*, 97 Acta Paediatrica, 153 (2008). Warm, involved fathers provide their children advantages in several areas of psychological development including: academic motivation and achievement, empathy, psychological autonomy, and self-control. *See* Richard A. Warshak, THE CUSTODY REVOLUTION: THE FATHER FACTOR AND MOTHERHOOD MYSTIQUE, 1992.

Research on families also buttresses the common sense notion that parental involvement and supervision of children is more frequent and stronger when children have two parents.

> We suspect that parental involvement and supervision are weaker in one-parent families than in two-parent families. In one sense, this advantage is simply a matter of numbers: one parent has less time and authority than two parents who can share responsibility and cooperate with each other. In another sense, however, it is due to the fact that single-parent families and stepfamilies are less stable in terms of personnel (grandmothers, mothers' boyfriends, and stepfathers are more likely to move in and out), which creates uncertainty about household rules and parental responsibilities. Irwin Garfinkel & Sara S. McLanahan, SINGLE MOTHERS AND THEIR CHILDREN: A NEW AMERICAN DILEMMA (1986).

When there are two involved parents, there is someone to help out with child care, perhaps participate in tough decisions, and perhaps take over when one parent needs a break from the demands of child care. E. Mavis Hetheringon & John Kelly, FOR BETTER OR FOR WORSE: DIVORCE RECONSIDERED, 2002.

In addition, research has clearly demonstrated that children who grow up apart from one of their parents are often disadvantaged:

> [O]n almost any measure of child well-being that you look at, these children . . . are more likely to drop out of school, they have lower grade point averages, they are more likely to become a teen mother, or to have a child outside of marriage, and, if they do marry, they

> are more likely to divorce. So almost any outcome that you look at you see this gap between the performances of children who live with both parents for eighteen years and the other children. And this occurs regardless of the social class background of the child. It occurs regardless of the race of the child. It is there regardless of the sex of the child. This differential, which is an increase in risk between two and three times greater than the risk [of negative outcomes in intact families], . . . occurs across all these outcomes. *Frontline* (Public Broadcasting System): *The Vanishing Father* (1995; documentary), DeWitt Sage, producer (Alexandria, Va.: PBS Video, 1995.

Would the father in this case be a warm, involved father? The trial court chose not to look. The GAL also did not look. In denying the father standing, first the trial court then the Kansas Supreme Court interpreted K.S.A. §38-1114(f) as presuming the father passively relinquished his parental rights when he did not know the law required him to preserve these rights in writing. *In re K.M.H.* at 1049. *Compare Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938) (holding that courts must "indulge every reasonable presumption against waiver of fundamental constitutional rights . . . A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege" that must result from a free and conscious choice.). Because it was the father who attempted to assert the children's rights and because of the inaction of the GAL, the

children's rights and interests to their father-child relationship were also passively terminated.

Keys and Dale respectfully assert that, when K.S.A. §38-1114(f) results in the "elaborate and meticulous safeguards" of the law being denied to children born via artificial insemination and in significant increases in the risks these children must face in their lives, this statutory scheme is unconstitutional and "not wise."

CONCLUSION

Amici respectfully request that this Court grant Petitioner's request for a writ of certiorari.

Respectfully submitted,

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